REPORTS OF CASES

DECIDED IN THE

SUPREME COURT

OF THE

STATE OF NORTH DAKOTA

MARCH, 1913, to JULY, 1913.

H. A. LIBBY
REPORTER

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OFFICERS OF THE COURT DURING THE PERIOD OF THESE REPORTS.

HON. BURLEIGH F. SPALDING, Chief Justice.
HON. CHARLES J. FISK, Judge.
HON. EDWARD T. BURKE, Judge.
HON. EVAN B. GOSS, Judge.
HON. ANDREW A. BRUCE, Judge.

H. A. LIBBY, Reporter.
R. D. HOSKINS, Clerk.

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District No. Two,
HON. CHARLES W. BUTTZ.
District No. Three,
HON. CHARLES A. POLLOCK.
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SEC. 101. Where a judgment or decree is reversed or confirmed by the Supreme Court, every point fairly arising upon the record of the case shall be considered and decided, and the reason therefor shall be concisely stated in writing, signed by the judges concurring, filed in the office of the Clerk of the Supreme Court, and preserved with a record of the case. Any judge dissenting therefrom may give the reasons for his dissent in writing over his signature.

SEC. 102. It shall be the duty of the court to prepare a syllabus of the points adjudicated in each case, which shall be concurred in by a majority of the judges thereof, and it shall be prefixed to the published reports of the case.

COUNTY COURTS.

In general, the county courts (so designated by the Constitution) are the same as the probate courts of other states.

Constitutional Provisions.

Sec. 110. There shall be established in each county a county court, which shall be a court of record open at all times and holden by one judge, elected by the electors of the county, and whose term of office shall be two years.

Sec. 111. The county court shall have exclusive original jurisdiction in probate and testamentary matters, the appointment of administrators and guardians, the settlement of the accounts of executors, administrators and guardians, the sale of lands by executors, administrators, and guardians, and such other probate jurisdiction as may be conferred by law; provided, that whenever the voters of any county having a population of two thousand or over shall decide by a majority vote that they desire the jurisdiction of said court increased above that limited by this Constitution, then said county court shall have concurrent jurisdiction with the district courts in all civil actions where the amount in controversy does not exceed one thousand dollars, and in all criminal actions below the grade of felony, and in case it is decided by the voters of any county to so increase the jurisdiction of said county court, the jurisdiction in cases of misdemeanors arising under state laws which may have been conferred upon police magistrates shall cease. The qualifications of the judge of the county court in counties where the jurisdiction of said court shall have been increased shall be the same as those of the district judge, except that he shall be a resident of the county at the time of his election, and said county judge shall receive such salary for his services as may be provided by law. In case the voters of any county decide to increase the

jurisdiction of said county courts, then such jurisdiction as thus increased shall remain until otherwise provided by law.

Statutory Provisions.

Increased Jurisdiction: Procedure. The rules of practice obtaining in county courts having increased jurisdiction are substantially the same as in the district courts of the state.

Appeals. Appeals from the decisions and judgments of such county courts may be taken direct to the supreme court.

The following named counties now have increased jurisdiction: Benson; Bowman; Cass; Dickey; La Moure; Ransom; Renville; Stutsman; Ward; Wells.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH DAKOTA

STATE v. KELLY et al.

(140 N. W. 714.)

Misdemeanor — conviction — appeal — request for time to plead.

Defendants were convicted of a misdemeanor and appeal, assigning as error that they had not been given a day after arraignment within which to plead or demur. *Held* that defendants have not brought themselves within the provisions of §§ 9889, 9890, and 9935, Rev. Codes 1905, having made no seasonable request for time to plead.

Opinion filed March 5, 1913.

An appeal from the County Court for Ransom County; *Thomas,* J. Affirmed.

Rourke & Kvello, for appellants.

Defendants' request for time in which to prepare for trial should have been granted. Statute, Sec. 9889; McFadin v. State, 44 Tex. Crim. Rep. 471, 72 S. W. 172; Whitesides v. State, 44 Tex. Crim. Rep. 410, 71 S. W. 969.

Filing new information on quashing of the former one makes a new case, entitling defendant to his day to plead. Whitesides v. State, supra.

It was error to overrule defendants' request for time to prepare for trial. Statute, § 9935; State v. Chase, 17 N. D. 429, 117 N. W. 537, 17 Ann. Cas. 520.

This was their right in the absence of the statute. Miller v. United States, 8 Okla. 315, 57 Pac. 837; Goodson v. United States, 7 Okla. 117, 54 Pac. 423; Johnson v. State, — Tex. Crim. Rep. —, 49 S. W. 618; State v. Pool, 50 La. Ann. 449, 23 So. 503.

The intent and purport of the statute, § 9935, are to afford defendants full opportunity to prepare for trial. Evans v. State, 36 Tex. Crim. Rep. 32, 35 S. W. 169; Whitesides v. State, 44 Tex. Crim. Rep. 410, 71 S. W. 969; Rev. Codes, Sec. 9889.

T. A. Curtis, State's Attorney, for respondent.

No request made for time to prepare. The information was allowed to be amended, as the defendants had not pleaded. This was permissible. Rev. Codes, § 9796.

The statute should be construed according to its plain import. McCord v. State, 2 Okla. Crim. Rep. 209, 101 Pac. 135.

In preparing brief counsel should refrain from anything of a personal nature, especially when wholly immaterial and irrelevant. Flannagan v. Ellton, 34 Neb. 355, 51 N. W. 967; Steils v. State, 7 Okla. Crim. Rep. 391, 124 Pac. 76; Gonzales v. State, 7 Okla. Crim. Rep. 444, 123 Pac. 705.

Goss, J. Defendants were jointly informed against for keeping and maintaining a common nuisance, a misdemeanor, at a designated time and place. Their arraignment was had on the charge on July 9, 1912, and they were given until the next day to answer, when they appeared by counsel and demurred to the information, which demurrer was sustained. The state's attorney thereupon immediately asked leave to file a new information, charging the same crime but curing the defect in the original one, which motion was forthwith granted and was complied with by an amended information being immediately filed on July 10th. Thereupon counsel for defendants made the following request: "We ask our day to plead; I think we will be ready by 2 o'clock." To which the court replied: "We are not going to delay any further in this matter." Then to the state's attorney: "Read the information." Thereupon arraignment upon the amended information was duly had,

at the conclusion of which the court inquired of the defendants and their counsel: "Do you refuse to enter a plea at this time?" To which reply was made: "Yes, sir." The court then ordered: "A plea of not guilty will be entered; proceed to trial." Objection was made by defendants and exception allowed to the action of the court. Thereupon counsel for defendant made the following request: "Permission of the court is now asked to prepare and serve a demurrer to that information;" which request was overruled and exception allowed. Then a jury was called into the box for examination, after which defendants' counsel interposed the following objection: "Defendants at this time object to the plea of not guilty entered by the court for the defendants and against the objection. The defendant at this time objects to the impaneling or swearing of a jury, or the taking of any other steps looking to the prosecution or conviction of the defendants, on the ground and for the reasons that they have been deprived of their legal rights of time to plead or demur to the information, or to prepare for trial." This objection was overruled and exception allowed. The trial proceeded, and at its conclusion the jury returned a verdict of guilty as against both defendants. They were duly sentenced on July 13, 1912, and on July 19th appealed from such judgment of conviction, assigning four errors, as follows:

"(1) It was error for the court to overrule defendants' motion for time to plead. (2) It was error for the court to overrule defendants' request for time to prepare for trial. (3) It was error for the court to order the entry of a plea of not guilty for the defendants and each of them over their objection. (4) It was error for the court to overrule the defendants' exception to the impaneling of a jury or the taking of any steps looking to the prosecution and conviction of these defendants."

The first assignment of error is based upon the alleged noncompliance with statutory provisions providing: "Sec. 9889. If, on the arraignment, the defendant requires it, he must be allowed until the next day, or such further time may be allowed him as the court may deem reasonable, to answer the information or indictment. Sec. 9890. If the defendant does not require time as provided in the last section, or if he does, then on the next day or at such further day as the court may have allowed him, he may, in answer to the arraignment, either move

the court to set aside the information or indictment, or may demur or plead thereto." Under the record as above recited defendant is not within the statute. By its terms any delay desired in the way of time to answer must be required, that is, requested or asked for by the defendant after arraignment, as he must "in answer to the arraignment either move the court to set aside the information or indictment, or may demur or plead thereto." The assignment sought to be based on this statute is one not going to the merits, and therefore is a technical objection at best; and we do not feel disposed to extend the statute by applying it to a case not coming strictly within its terms, when we are asked to set aside a conviction solely upon such grounds. Arraignment had not taken place at the time that an additional day's time to plead was requested, and the denial of the application at that time made was proper, as defendants had then no right to delay the arraignment subsequently occurring. After arraignment, when it came time for defendants to move to set aside the information, demur or enter plea thereto, no request for time was made; but instead, the defendants stood mute and the court complied with the provisions of § 9918, providing that "if the defendant refuses to answer the information or indictment by demurrer or plea, a plea of not guilty must be entered," and properly forthwith ordered and had entered the plea of not guilty as the plea of the defendants to the information. As a motion to set aside or a demurrer must be entered in advance of the plea, if at all, the request of counsel for permission to prepare and serve a demurrer, coming after the entry of plea, came too late, and its denial was proper. The first, third, and fourth assignments are therefore without merit.

As to the second assignment, alleging error because of the overruling of the defendants' request for time to prepare for trial, the record fails to show any such request. It is true that, after the jury had been called for examination as to their qualifications to sit as jurors in the cause, an exception to further proceedings was entered on the grounds of the denial "of their legal right of time to plead or demur to the information or to prepare for trial." This objection was not based upon any request within the terms of § 9935, Rev. Codes 1905, Providing: "After his plea the defendant, if he requests it, is entitled to at least one day to prepare for trial." After the entry of plea, no request whatever was made, except permission to prepare and serve a demurrer to the informa-

tion. Inasmuch as the sufficiency of the amended information is not challenged, and the request came too late, being after the entry of plea as above stated, we cannot see how the denial of the request to serve and file a demurrer could in any event be considered prejudicial; nor can we construe the request so denied as any request for time to prepare for trial under the provisions of § 9935. No rights of the defendants were infringed or jeopardized by the rulings complained of, but instead, the usual and ordinary procedure concerning arraignment, entry of plea, and commencement of trial in all respects was followed. Defendants have not brought themselves within any of the provisions of the statute sought to be invoked. For that reason none of the authorities cited by appellants are in point. The second assignment of error has been in State v. Chase, 17 N. D. 429, 117 N. W. 537, 17 Ann. Cas. 520, decided adversely to appellants' contention and in line with our conclusions.

The judgment appealed from is accordingly ordered affirmed.

BRUCE, J. (concurring specially). I concur in the result of the above opinion for the reason that I do not think that the defendant made a request after the arraignment for any further time to prepare for trial or to plead, and because I believe that the demurrer, if interposed, would have been unavailing. In other words, I think that the amended information charged an offense. I, however, am inclined to believe that permission to interpose such demurrer should have been granted, and that the mere fact that the court asked the defendant the question: "Do you refuse to enter a *plea* at this time?" which was answered by, "Yes, sir,"—did not preclude the defendant from asking and insisting upon the right to file a demurrer. I think, in short, that there was error, but that under the state of the record it was error without prejudice.

CHRIST and the Golden Valley Land & Cattle Company, for the Use and Benefit of said A. T. Christ, and John Weber and Mary Weber, His Wife, for the Use and Benefit of said A. T. Christ, v. JOHN JOHNSTONE and Carrie Johnstone, by J. A. Miller, her Guardian *ad Litem*.

(140 N. W. 678.)

Appeals — findings of fact — trial court — judgment — retrial — conclusions of law.

1. Section 7229, Rev. Codes 1905, commonly known as the Newman act, is not in itself a complete enactment upon appeals, but is an incident of the general appeal law covered by chapter 15 of the 1905 Revised Codes. Its provisions apply to equity cases tried by the jury, wherein the appellant desires the supreme court to retry some or all of the issues of fact. If appellant is satisfied with the findings of fact made by the trial court, but appeals from the judgment entered thereon, he has a right to such appeal without demanding a retrial of any issue of fact. In such appeal this court will assume that all questions of fact have been properly decided by the trial court, and will only determine whether or not the judgment entered and the conclusions of law announced are supported by the findings of fact. The appeal in such a case is governed by all of the sections of said chapter 15, including § 7205, and may be from the whole or any part of such judgment.

Personal judgment — use plaintiff — nominal plaintiff — use and occupation.

2. The trial court found among other things, that the nominal plaintiff herein should recover a personal judgment against the defendants for the use of certain lands for certain enumerated years. Under the findings of fact such nominal plaintiff is entitled to no judgment excepting as might be obtained by the use plaintiff had the action been brought in the name of the said use plaintiff. As it is undisputed that the use plaintiff was not the owner of the land during four of the years in question, and had received no assignment of the cause of action, said use plaintiff was not entitled to judgment for the use of the lands for these years, and the nominal plaintiff was not entitled to the judgment entered. Judgment reduced in accordance with the facts stated in the opinion.

Opinion filed March 7, 1913. Rehearing denied March 18, 1913.

Appeal from the District Court for Billings County; *Nuchols*, J. Modified.

Heffron & Baird and *J. A. Miller*, for appellants.

A person owning real estate cannot recover for trespass or injury to, or for the use and occupation of, such real estate, for a time prior to acquiring title. Sibbald's Estate, 18 Pa. 249; Schuylkill & S. Nav. Co. v. Decker, 2 Watts, 343; McFadden v. Johnson, 72 Pa. 335, 13 Am. Rep. 681; Masterson v. Hagan, 17 B. Mon. 328; 3 Sutherland, Damages, § 992, p. 2923.

Purcell & Divet and *T. F. Murtha,* for respondents.

This cause was properly tried as an action in equity. The appeal should be dismissed, because it is from only a part of the judgment. Prescott v. Brooks, 11 N. D. 93, 90 N. W. 129; Tronsrud v. Farm Land & Finance Co. 18 N. D. 417, 121 N. W. 68.

BURKE, J. This action was brought to quiet title to a quarter section of land in Billings county. The trial was had by the district court without a jury, under § 7229, Rev. Codes 1905, and findings of fact and conclusions of law favorable to the plaintiff were made and filed. Within the proper time the defendant served and filed the following notice of appeal: "Please take notice that the defendants hereby appeal to the supreme court of the state of North Dakota from that portion of the judgment in this action . . . which orders, adjudges and decrees that plaintiff have and recover from the defendant John Johnstone the sum of $625 as the value of the use and occupation of the land in controversy in this action." Respondents move to dismiss this appeal upon the ground that it is an appeal from a part only of a judgment.

(1) In support of this motion we are cited to Tyler v. Shea, 4 N. D. 377, 50 Am. St. Rep. 660, 61 N. W. 468; Christianson v. Farmers' Warehouse Asso. 5 N. D. 438, 32 L.R.A. 730, 67 N. W. 300; Nichols & S. Co. v. Stangler, 7 N. D. 102, 72 N. W. 1089; Prescott v. Brooks, 11 N. D. 93, 90 N. W. 129; Crane v. Odegard, 11 N. D. 342, 91 N. W. 962; and Tronsrud v. Farm Land & Finance Co. 18 N. D. 417, 121 N. W. 68; but a careful examination of these cases does not bear out respondents' contention. It will be noted that chapter 15 of the Code of Civil Procedure, beginning with § 7202 and ending with § 7231, governs appeals to the supreme court in civil actions generally. Section 7229 is but a subdivision of said chapter 15, and not a complete enactment in itself. This is apparent from an examination of said

section, which contains in itself no provisions regarding the undertaking on appeal, justification of the sureties, time for appeal, transmission of papers, stay of execution, or other equally important matters which are found elsewhere in said chapter 15. The said § 7229, which has become known as the Newman act, is an incident to our general appeal law, applicable when the appellant desires to have the supreme court retry some question of fact in an equity action. The following extract from said section shows its general import: "In all actions tried by the district court without a jury, in which an issue of fact has been joined, . . . all the evidence offered on the trial shall be received. . . . A party desiring to appeal from a judgment in any such action shall cause a statement of the case to be settled, . . . and shall specify therein the questions of fact that he desires the supreme court to review, and all questions of fact not so specified shall be deemed on appeal to have been properly decided by the court, . . . but if the appellant shall specify in the statement that he desires to review the entire case, all the evidence and proceedings shall be embodied in the statement, . . . the supreme court shall try anew the question of fact specified in the statement or in the entire case if the appellant demands a retrial in the entire case, and shall finally dispose of the same whenever justice can be done without a new trial. . . ." This section has been amended several times since its first enactment, and the earlier cases must be read in connection with the law as it existed at the time when they were written. When so read, we find nothing in the cases already cited inconsistent with the decision which we have reached in this case. While the language of the earlier cases mentioned might lead to the conclusion that an appeal may not be taken from a part of a judgment under such Newman act, we think the real holding in the matter is best expressed by Judge Young in the opinion on rehearing in the case of Prescott v. Brooks, 11 N. D. 93, 90 N. W. 129, wherein he says: "The question whether an appeal may or may not be taken from a part of a judgment is not involved. . . . It will be time enough to settle this question for this jurisdiction when it is directly involved. The question which is decisive of this appeal is not whether an appeal may be taken from a part of a judgment, but is whether a retrial can be had in this court upon such an appeal. The right of appeal is one thing and the right of retrial on the merits is

another and wholly different matter. To determine whether the right of appeal exists in any case, we must look to the statute authorizing appeals, and to ascertain whether a right of retrial in this court exists we must look to the statute authorizing retrials." From this language it will be seen that the so-called Newman act deals only with *retrials* in this court, and its relation to appeals generally is incidental. A party who has tried his case under the Newman act may be satisfied with the findings of the trial court, and therefore not desire a trial anew in this court. Under those circumstances it cannot be seriously urged that he must demand and submit to a new trial that he does not desire, in order to have some intermediate order of the trial court reviewed, or to test the correctness of the judgment entered upon such finding. In such a case he appeals under the general provisions of said chapter 15. Said appeal is governed by the provisions of § 7205, which contains the following provision: "An appeal must be taken by serving a notice in writing . . . stating . . . whether the appeal is from the whole or a part thereof, and, if from a part only, specifying the part appealed from. . . ." In the case at bar appellant has specified that his appeal is from that portion of the judgment which requires him to pay $625. Every question of fact found by the trial court must be assumed to have been correctly tried, and this court will therefore examine the judgment only to ascertain whether or not the findings of fact justified the entry of that portion of the judgment requiring the payment of said sum. We believe that the following-named cases are more nearly in point than those cited by the respondent in support of his motion. See Edmonson v. White, 8 N. D. 72, 76 N. W. 986, where there was a defective statement of the case, wherein this court said: "The appellants contend finally that the conclusions of law are not justified by the facts found by the trial court. . . . These facts, which cannot be reviewed upon this record, manifestly justified the trial court in concluding that the land is not subject to seizure and sale on final process." In National Cash Register Co. v. Wilson, 9 N. D. 112, 81 N. W. 285, wherein there was no statement of the case presented to this court, it is said: "Under these conditions our authority to re-examine is confined to such intermediate orders or determinations of the trial court as involve the merits and necessarily affect the judgment, and appear upon the face of the record transmitted

to this court. . . . Turning to the judgment roll we find it embraces the complaint, an answer, and a demurrer to one of the defenses set up in the answer, an order sustaining the demurrer, order for judgment, and judgment. The record then presents for review the correctness of the order sustaining the demurrer, and that question only." Similar rulings are found in the Security Improv. Co. v. Cass County, 9 N. D. 553, 84 N. W. 477; State ex rel. McGlory v. McGruer, 9 N. D. 566, 84 N. W. 363; Douglas v. Richards, 10 N. D. 366, 87 N. W. 600; Eakin v. Campbell, 10 N. D. 416, 87 N. W. 991; State ex rel. Wiles v. Heinrich, 11 N. D. 31, 88 N. W. 734, where it is said, after the statement of the case had been stricken out. "We still have before us the judgment roll proper, after eliminating from consideration the defective statement. Error is predicated thereon, and the same is presented to us for review by a proper assignment in appellant's brief. The single error assigned upon the statutory judgment roll is that 'the conclusion of law and judgment are not justified by the findings of fact.'" See also Sykes v. Beck, 12 N. D. 242, 96 N. W. 844. We conclude, therefore, that the motion to dismiss the appeal should be denied and the appeal considered upon its merits.

(2) The trial court found, among other things, that the Golden Valley Land & Cattle Company was the nominal plaintiff and the plaintiff A. T. Christ was the use plaintiff. It also found: "That on or about the 20th day of January, 1908, the said Golden Valley Land & Cattle Company, did, while the defendant John Johnstone was in possession as aforesaid, sell the said land and convey it by warranty deed to the plaintiff John Weber, on or about the 4th day of February, 1909, and said John Weber and Mary Weber, his wife, did sell the same and convey it by warranty deed to A. T. Christ, and that the said lands were agricultural lands, capable of and suitable for cultivation, and a fair and reasonable value of the use and occupation thereof by the defendant John Johnstone, from the time he took possession thereof until the time of the trial of this action, is the sum of $125 for each farming year, or $625 in all." Upon the findings the trial court based its conclusions of law, among which are the following: "That the title of the Golden Valley Land & Cattle Company shall be quieted and confirmed in it as against the defendants and all of them, . . . and the said plaintiff, Golden Valley Land & Cattle Company, shall recover

from the defendant John Johnstone the value of the use and occupation of said land for the various years from 1906 to 1910, inclusive, in the sum of $625." Of course the plaintiff, the Golden Valley Land & Cattle Company, is merely nominal, and as such is entitled to no relief whatever in this action. It must recover only such relief as the other plaintiff, A. T. Christ, could recover were he permitted by our statute to maintain the action in his own name. No judgment can be entered in this action that could not be entered in favor of the plaintiff A. T. Christ were he permitted to bring the action in his own name. With this in mind, and remembering also the finding of the trial court that Christ bought the land after the 4th day of February, 1909, can he recover for its use for the years 1906, 7, 8, in the absence of an allegation that the Golden Valley Land & Cattle Company has assigned to him its cause of action, for the use of the land? We think not. Appellant concedes that he is liable to Christ for the years 1909–1910, and we believe those years are all for which recovery can be had in the present action. The trial court will therefore modify its judgment, reducing the amount of damages from $625 to $250.

Appellant will recover his costs in this action.

BOWEN v. DURANT.

(140 N. W. 728.)

Depositions — trial — reading — portions — issue — material — competent — relevant.

1. While mere excerpt or fragmentary and isolated portions of a deposition may not be singled out and read, but the entire portion thereof bearing upon the issue sought to be proved must be introduced, if any is offered, it is held that a party is not obliged to offer the entire deposition, but may read in evidence such portion thereof as is competent, relevant, and material to the issue which he seeks to establish.

Note.—That plaintiff may introduce the remaining parts of a deposition which are relevant and competent when defendant calls out and introduces certain portions of it is declared in Walter v. Sperry, 86 Conn. 474, 44 L.R.A.(N.S.) 28, 85 Atl. 739.

Entire deposition — trial court — discretion — abuse — deposition — reading parts — nonpayment.

2. Although discretionary with the court to require the entire deposition to be offered, instead of a portion thereof, such discretion is not absolute, and it is held, under the facts in the case at bar, that it was an abuse of discretion to refuse plaintiff's request to read the portion of the deposition relating to the issue of nonpayment by defendant of plaintiff's claim.

Opinion filed March 18, 1913.

Appeal from District Court, Ramsey County; *Frank Fisk,* Special J.

Appeal from an order denying a motion for a new trial.

Reversed.

Flynn & Traynor, for appellant.

Payment is a matter of defense, and must be pleaded and proved. Cochran v. Reich, 91 Hun, 440, 36 N. Y. Supp. 233; 30 Cyc. 1264–1272; Dry Dock E. B. & B. R. Co. v. North & East River R. Co. 3 Misc. 61, 22 N. Y. Supp. 556; Crawford v. Tyng, 10 Misc. 143, 30 N. Y. Supp. 907; Hummel v. Moore, 25 Fed. 380; Baldwin v. Clock, 68 Mich. 201, 35 N. W. 904; Bannister v. Wallace, 14 Tex. Civ. App. 452, 37 S. W. 250; Pierce v. Hower, 142 Ind. 626, 42 N. E. 223; Barker v. Wheeler, 62 Neb. 150, 87 N. W. 20; Second Nat. Bank v. First Nat. Bank, 8 N. D. 50, 76 N. W. 504.

The duty of alleging and proving payment is on the defendant, where such defense is relied upon. Satterlund v. Beal, 12 N. D. 122, 95 N. W. 518; Clark v. Mullen, 16 Neb. 481, 20 N. W. 642; Clark v. Wick, 25 Or. 446, 36 Pac. 165; Farnham v. Murch, 36 Minn. 328, 31 N. W. 453; Stewart v. Budd, 7 Mont. 573, 19 Pac. 221.

A party may introduce and read that part, or those distinct portions of a deposition material and relevant to the issue before the court. First Nat. Bank v. Minneapolis & N. Elevator Co. 11 N. D. 280, 91 N. W. 440; Gussner v. Hawks, 13 N. D. 453, 101 N. W. 898; 13 Cyc. 985; 13 Current Law, 1303; Crotty v. Chicago, G. W. R. Co. 95 C. C. A. 91, 169 Fed. 593; 15 Current Law, 1369; Central Coal & Coke Co. v. Penny, 97 C. C. A. 600, 173 Fed. 340.

No appearance for respondent.

Fisk, J. Action to recover a balance claimed to be due plaintiff

from defendant as the purchase price of certain personal property sold and delivered by plaintiff to defendant in September, 1910. Defendant prevailed in the district court, a verdict having been directed in his favor. From an order denying plaintiff's motion for a new trial, he appeals.

The assignments of error challenge the rulings of the trial court in sustaining defendant's objection to plaintiff's offer to read in evidence a certain portion of a deposition, and in directing a verdict as aforesaid. Also in denying the plaintiff's motion for a new trial.

We deem it necessary to consider but one question on this appeal; namely, whether it was error to deny plaintiff's offer to read a portion of the deposition of the plaintiff in evidence. We are agreed that such ruling constituted prejudicial error, necessitating a new trial. The trial court ruled that it was incumbent upon plaintiff, in order to make out a prima facie case, to prove nonpayment by defendant of such balance of the purchase price. Whether such ruling was correct, we need not here determine, for, conceding for the purposes of this case the correctness of such ruling, it was manifestly a clear abuse of discretion, if not a palpable error, to exclude the portion of the deposition offered by plaintiff. The portion which plaintiff thus offered to read was not a mere excerpt thereof, but such offer embraced practically all of the deposition relating to the subject of nonpayment by defendant of the balance of the purchase price claimed to be due and owing to plaintiff, and there is nothing whatever in the remainder of the deposition which tends in the least to qualify or detract from the testimony which plaintiff offered to read in evidence. In fact, aside from the question and answer, "Has he ever paid you since, anything on this? No, sir, only except the $21," the portion not offered is immaterial and irrelevant.

Subject to the court's discretion to otherwise order it is well settled that a party is not obliged to offer the entire deposition, but may read in evidence such portion thereof as is competent, relevant, and material to the issue which he seeks to establish. It is, of course, equally well settled that mere excerpts or fragmentary and isolated portions may not be singled out and read, but the entire portion bearing upon the issue sought to be proved must be read, if any is offered. First Nat. Bank v. Minneapolis & N. Elevator Co. 11 N. D. 280, 91 N. W. 436;

Gussner v. Hawks, 13 N. D. 453, 101 N. W. 898; 13 Cyc. 985 and cases cited; 13 Current Law, 1303; 15 Id. 1369; Central Coal & Coke Co. v. Penny, 97 C. C. A. 600, 173 Fed. 340.

Although discretionary with the court to require the entire deposition to be offered, such discretion is not absolute, and we are agreed that, under the facts disclosed by this record, the ruling complained of was an abuse of discretion.

The order appealed from is accordingly reversed and the cause remanded for a new trial.

NORTHERN PACIFIC RAILWAY COMPANY v. JURGENSON, Police Magistrate for Wahpeton, Richland County, North Dakota, and as such Police Magistrate, W. S. Genaro, Geo. W. Freerks, and G. E. Moody, Sheriff of Richland County, North Dakota.

(141 N. W. 70.)

Writ of prohibition — proceedings — notice to show cause — alternative writ.

1. Proceedings to obtain a writ of prohibition may be initiated either by notice to show cause why a writ should not issue, or by securing, in the first instance, an alternative writ.

Proceedings — inferior courts — stay — order to show cause — process — Constitution.

2. When it is sought to stay further proceedings of an inferior court, in an action pending or on a judgment entered therein, and notice is served by means of an order to show cause, such notice need not run in the name of the state of North Dakota, as it is not a writ, and is not process within the meaning of § 97 of the Constitution.

Order to show cause — justice court — parties — jurisdiction.

3. In proceedings initiated through an order to show cause in the district court why a writ of prohibition should not issue against a justice court, the object of which was to prohibit further proceedings of the justice, alleged to be without or in excess of his jurisdiction, the opposing party in the action in the justice court was a proper party defendant, but he was not a necessary party.

Application — hearing — continuance — discretion — dismissal — error.

4. In such case, it would be proper for the district court, in the exercise of its sound discretion, to continue the hearing of the application, and require service to be made upon the original plaintiff; yet when the record shows that he dismissed the application, not in the exercise of his discretion, but from the mistaken belief that such person was a necessary party, the action of such court will not be sustained.

Filed March 20, 1913.

Appeal from an order and judgment of the District Court for Richland County; *Allen,* J.

Reversed.

Ball, Watson, Young, & Lawrence and *E. T. Conmy,* for appellant.

An order to show cause does not need to run in the *name* of the *state* of *North Dakota.*

Such order is not a *writ* or *process.* State v. Kerr, 3 N. D. 523, 58 N. W. 27; State v. Thompson, 4 S. D. 95, 55 N. W. 725; Moore v. Fedewa, 13 Neb. 379, 14 N. W. 170; McPherson v. First Nat. Bank, 12 Neb. 202, 10 N. W. 707; Rev. Codes 1905, sec. 7825.

The order issued in this case is not a mandamus, but merely an order to show cause why one should not issue. The practice substantially complies with the statute. People ex rel. Crouse v. Fulton County, 70 Hun, 560, 24 N. Y. Supp. 399; Taylor v. Henry, 2 Pick. 397; Curry v. Hinman, 11 Ill. 420; Crawford v. Darrow, 87 Neb. 494, 127 N. W. 891; 26 Cyc. 471; Gilmer v. Bird, 15 Fla. 411.

A mere *notice* given by an attorney is not process. Comet Consol. Min. Co. v. Frost, 15 Colo. 310, 25 Pac. 506; Hanna v. Russell, 12 Minn. 80, Gil. 43; Bailey v. Williams, 6 Or. 71; Nichols v. Burlington & L. County Pl. Road Co. 4 G. Greene, 44; Brooks v. Nevada Nickel Syndicate, 24 Nev. 311, 53 Pac. 599; Porter v. Vandercook, 11 Wis. 70; Rudd v. Thompson, 22 Ark. 363; Cheney v. Beall, 69 Ga. 533; Hearsey v. Bradbury, 9 Mass. 95; Carroll v. Peck, 31 Tex. 649; Hansford v. Hansford, 34 Mo. App. 262; Mitchell v. Conley, 13 Ark. 414; McFadden v. Fortier, 20 Ill. 509.

The writ of prohibition is issued upon affidavit on the application

of the person beneficially interested. Rev. Codes 1905, Secs. 7835, 7836.

The only necessary defendant is the tribunal whose proceedings are sought to be restrained, controlled, or quashed. Washburn v. Phillips, 2 Met. 296; Grant v. Gould, 2 H. Bl. 69, 3 Revised Rep. 342; Comyns's Dig. Prohibition, F. 6; Searle v. Williams, Hobart, 288; Reg. v. Herford, 3 El. & El. 115, 29 L. J. Q. B. N. S. 249, 6 Jur. 750, 2 L. T. N. S. 459, 8 Week. Rep. 579, 7 Eng. Rul. Cas. 157; Zylstra v. Charleston, 1 Bay, 382; Connecticut River R. Co. v. Franklin County, 127 Mass. 59, 34 Am. Rep. 338; Smith v. Whitney, 116 U. S. 167, 29 L. ed. 601, 6 Sup. Ct. Rep. 570; St. Louis County Ct. v. Sparks, 10 Mo. 120, 45 Am. Dec. 355; People ex rel. Knapp v. Court of C. P. Judges, 4 Cow. 403; People ex rel. Bentley v. Highway Comrs. 7 Wend. 474; People ex rel. Tremper v. Ulster County, 1 Johns. 64.

Where mandamus is invoked against an inferior court, it is sufficient to address the writ to either the court, as such, or to the judge composing it. St. Louis County Ct. v. Sparks, 10 Mo. 120, 45 Am. Dec. 355; Fry v. Reynolds, 33 Ark. 450; High, Inj. § 440; Huron v. Campbell, 3 S. D. 309, 53 N. W. 183; Sherlock v. Jacksonville, 17 Fla. 93; State ex rel. Dowling v. Mix, 33 La. Ann. 794; Lincoln-Lucky & L. Min. Co. v. District Ct. 7 N. M. 486, 38 Pac. 580; Winsor v. Bridges, 24 Wash. 540, 64 Pac. 780; Coronado v. San Diego, 97 Cal. 440, 32 Pac. 518; People ex rel. Earle v. Circuit Ct. 169 Ill. 201, 48 N. E. 717.

Prohibition is a legal remedy, and the writ is directed to and operates upon the court, and is preventive in effect. 23 Am. & Eng. Enc. Law, 197.

Geo. W. Freerks, for respondents.

The alternative writ of prohibition, with the "order to show cause" features, is original notice—process—the only means by which the parties and subject-matter not yet in court are brought in, and notice to all interested parties is necessary—and the process should be styled in name of state. Const. §§ 21–97.

Writ, means an order or precept in writing, issued in the name of the state, or of a court or judicial officer. Rev. Codes 1905, Sec. 6738; 26 Cyc. 471.

Process is synonymous with *writ,* all *writs* being called process.

Carey v. German American Ins. Co. 84 Wis. 80, 20 L.R.A. 267, 36 Am. St. Rep. 907, 54 N. W. 18; Philadelphia v. Campbell, 11 Phila. 163; Wilson v. St. Louis & S. F. R. Co. 108 Mo. 588, 32 Am. St. Rep. 624, 18 S. W. 286; Savage v. Oliver, 110 Ga. 636, 36 S. E. 54; Hinkley v. St. Anthony Falls Water Power Co. 9 Minn. 55, Gil. 44; United States v. Murphy, 82 Fed. 893; Davenport v. Bird, 34 Iowa, 524; Utica City Bank v. Buel, 17 How. Pr. 498; Witherspoon v. State, 42 Tex. Crim. Rep. 532, 96 Am. St. Rep. 812, 61 S. W. 396; State ex rel. Enderlin State Bank v. Rose, 4 N. D. 319, 26 L.R.A. 593, 58 N. W. 514; State ex rel. Atty. Gen. v. District Ct. 13 N. D. 211, 100 N. W. 248.

A judgment such as is shown by the application papers herein, cannot be abolished, or drawn in question by a prohibition proceeding. The remedy is by appeal. Kellogg v. Wayne Circuit Judge, 167 Mich. 95, 132 N. W. 501; Heard v. Holbrook, 21 N. D. 348, 131 N. W. 251; Re Pierce-Arrow Motor Car Co. 143 Wis. 282, 127 N. W. 998; Selzer v. Bagley, 19 N. D. 697, 124 N. W. 426; Zinn v. District Ct. 17 N. D. 128, 114 N. W. 475; State ex rel. De Puy v. Evans, 88 Wis. 255, 60 N. W. 433; People ex rel. Hudson v. Detroit Superior Ct. Judge, 42 Mich. 239, 3 N. W. 850, 913.

SPALDING, Ch. J. This appeal is from a judgment of the district court of Richland county, awarding plaintiff costs on a motion for an order to show cause and from the court's order sustaining plaintiff's objections made and filed with the court on the return of such order to show cause. It appears that a purported judgment was obtained by the defendant Genaro in a police magistrate's court in Richland county against the plaintiff herein, on default; that on the 8th day of November, 1911, Honorable Frank P. Allen, judge of the district court of Richland county, granted plaintiff herein an order to show cause, returnable before him on the 27th day of November, 1911, why a writ should not be issued restraining, enjoining, and prohibiting defendants, and each of them, from proceeding further upon the execution issued in the action of Genaro v. Northern Pacific Railroad Company, and why such execution should not be held void, and the parties named restrained, enjoined, and prohibited from in any manner further levying upon or seizing or selling the property of said company under any

claim of any judgment or purported judgment rendered in said action. The order to show cause was based upon an affidavit of counsel, setting forth facts which it is unnecessary to relate here, further than that it alleged that no judgment had ever been rendered or entered against the railroad company in said action in said court, and that the execution issued or attempted to be issued on a pretended judgment was void and invalid as wholly unauthorized and without and in excess of the jurisdiction of the police magistrate; and that any levy or attempted levy thereunder was wholly void and without and in excess of the jurisdiction of the defendants and each of them, because no judgment had been rendered or entered in said court and in such action. On the return day counsel for Genaro, plaintiff in the police court, filed objections to the jurisdiction of the court, on the ground that the writ and order to show cause issued did not run in the name of the state of North Dakota or under its authority, and that the style thereof was not "the State of North Dakota," as provided by § 97 of the Constitution of the state of North Dakota; and for the further reason that the defendant Genaro, the party beneficially interested, had not in any wise been served with such or any other process or notice in the premises. The court sustained these objections, and the two questions before us for determination are whether it was necessary for the order to show cause to be addressed to an officer in the name of the state of North Dakota, and whether service thereof upon defendant Genaro was necessary to give jurisdiction to the court in the premises.

Respondent argues with much force that the so-called order to show cause was, in law, an alternative writ of prohibition, and that as such writ it was process, and not having run in the style of the state of North Dakota,—that is, not having read, "The state of North Dakota to" the sheriff or some other officer,—it was invalid; and that therefore no valid proceedings could subsequently be had thereon, in the light of the special appearance for the respondents and the objection made in their behalf.

An examination of the authorities on this question, and of the principles announced, renders it clear that in this the respondent is mistaken.

We will first give some attention to the provisions of our statute. Section 7836, Rev. Codes 1905, authorizes the issuance of the writ of pro-

hibition by the supreme and district courts to an inferior tribunal, etc. Section 7837 requires the writ to be alternative or peremptory, and distinguishes between alternative and peremptory writs. Section 7838 makes certain provisions of the procedure on mandamus applicable, and among such provisions we find § 7825, which reads: "When the application to the court is made without notice to the adverse party, and the writ is allowed, the alternative writ must be first issued; but if the application is upon due notice, and the writ is allowed, the peremptory writ may be issued in the first instance. The notice of the application when given must be at least ten days. . . ."

Writs are issued by the court through the clerk. Orders to show cause, under our practice, are signed by the judge. This order was signed by the judge. The practice in this state has long been established, and justifies the initiation of the proceeding through an order to show cause of the character of the one here involved. Such orders to show cause have been issued repeatedly by this court in various special proceedings, and have, so far as we are aware, never run in the name or style of the state of North Dakota. When writs have been issued they have been issued by the clerk upon the order of the court, but orders to show cause have invariably been signed by a member of the court. It is true the order to show cause often contains some of the same provisions found in an alternative writ, but ordinarily an order to show cause is only another name for a notice and another method of submitting a motion; and § 7825, supra, clearly contemplates the application being made upon notice when a peremptory writ is sought in the first instance. Such notice may be given by means of the simple notice signed by counsel, or through the agency of an order to show cause, issued by the court or a judge. This is a combined notice and motion. The works on the subject all seem to contemplate application for the writ, either by notice or by order to show cause, and none of the approved forms of an order to show cause that we find contain the greeting which respondent contends is essential to jurisdiction. See the title, Writ of Prohibition, 14 Enc. Forms, 987; Writ of Mandamus, 13 Enc. Forms, 767; 13 Enc. Pl. & Pr. 767.

Respondents' counsel seems to have, himself, treated this as an order to show cause, rather than as a writ; for we find in the record that, prior to the granting of the order to show cause under consideration,

another similar order of the same court had been granted, and on the return day respondents' counsel appeared and objected to the jurisdiction of the court, because ten days' notice had not been given as required by § 7825, supra. In addition to the difference between an order to show cause and an alternative writ, which we have mentioned, the authorities make a further distinction, and, if applicable in this jurisdiction,—and we think it is,—it clearly brings the order in the case at bar under the designation of an order to show cause, rather than of a writ. It is held in such authorities that the difference in practice between a rule to show cause why a peremptory writ should not issue and an alternative writ is that, in case of a rule to show cause, the questions arising upon the application are brought before the court and discussed upon affidavits, while in the case of the alternative writ they come before the court upon the writ itself, which sets forth the facts upon which the application is founded, and upon the defendant's return thereto. See People ex rel. Wiswall v. Judges, 3 How. Pr. 164, and authorities cited. Further distinctions are found which it is unnecessary to here consider; but if the rule announced is applicable here, as we believe it is, it is clear that we have not an alternative writ, but an order to show cause simply. The order did not recite nor cover the grounds of the application. They were contained in an affidavit. We are of the opinion that the district court improperly sustained the first objection. We reach this conclusion without considering the requirements of § 97 of the Constitution in their application to this document, had it been a writ. Several authorities are found which hold that, even though it were an alternative writ, it is not process within the meaning of such provisions. See People ex rel. Wiswall v. Judges, supra; 5 Wait, Pr. 604.

In Williamson v. County Ct. 56 W. Va. 38, 48 S. E. 835, 3 Ann. Cas. 355, the identical question we have been considering was passed upon. The Constitution of that state contained the same provision found in ours. The court said: "But we hold that 'the rule is only the necessary preliminary notice' to inform the defendant that the writ of prohibition has been applied for, is not a writ within the meaning of the Constitution, and need not run in the name of the state. Therefore, we refuse to quash the rules for that reason." See also Taylor v. Henry, 2 Pick. 397; 26 Cyc. 471; Hanna v. Russell, 12 Minn. 80, Gil. 43;

Bailey v. Williams, 6 Or. 71; Kimball v. Taylor, 2 Woods, 37, Fed. Cas. No. 7,775; Comet Consol. Min. Co. v. Frost, 15 Colo. 310, 25 Pac. 506; Gilmer v. Bird, 15 Fla. 410; Nichols v. Burlington & L. County Pl. Road Co. 4 G. Greene, 42; Porter v. Vandercook, 11 Wis. 70.

The above relate to the summons, and may not be applicable to a summons in this state, because § 6738, Rev. Codes 1905, appears to define process and include therein the summons, but the principles announced therein apply to a notice which is not a summons.

2. As to the second proposition, namely the necessity of serving the order to show cause upon Genaro, who was the plaintiff in the action in the justice court, many authorities hold it necessary to make such service, but on examination most, if not all, are from states where the statute requires such party to be made a defendant and to be served. On the other hand, in the absence of such a statute, the authorities are to the effect that, while he may be a proper party, he is not a necessary one where the proposed writ is to be directed to the action of a court or of an official. We are satisfied that in this state, under the law as it now stands, Genaro was a proper party, but not a necessary party; and that if the circumstances were such that the court to which the application was made felt it necessary, or even proper, that he should be brought in, the proper practice would have been for that court to have continued the hearing and directed service made upon him. We cannot see that injury was worked to him by not serving him in the case at bar. His counsel in the justice court was made a party and was served. The justice or police magistrate was the proper party to whom it was proposed to address the writ if issued. It was the action of that official which it was proposed to arrest, not any act of Genaro. The court might, in its discretion, have required service upon Genaro, and did the record disclose that the court refused to proceed without such service, in the exercise of its discretion, rather than on the ground that such service was imperatively necessary, we should be disposed to sustain its action. It is elementary that where a record is made which negatives the exercise of discretion on the part of the court, we are only to consider the reason given for its decision. The exact reason in this case was that he was a necessary party. This eliminates all question of the exercise of discretion. The purpose of the writ was to arrest the proceedings of a tri-

bunal which it was alleged was proceeding without or in excess of jurisdiction. Rev. Codes 1905, § 7835. And the writ, when issued, is to an inferior tribunal. The only purpose of requiring service on Genaro would have been to notify him that the issuance of such a writ was contemplated. And although, as we have said, he may have been a proper party, he was not a necessary party. Connecticut River R. Co. v. Franklin County, 127 Mass. 59, 34 Am. Rep. 338; High, Extr. Legal Rem. § 446.

Our sister state of South Dakota has passed upon this question under a statute identical with ours, and it held that the alternative writ, when issued, only runs to the party who is required to perform the act; that notice is a substitute for such alternative writ, and that it need not be served on the plaintiff in the action in the lower court before the issuance of the peremptory writ. The legislature can hardly have contemplated that service on Genaro was necessary; otherwise it would have so stated and would have made provision for service of an order to show cause on a nonresident. In case of a nonresident party the proceeding would be defeated for want of such service, if it is in law necessary. We have reached the conclusion that failure to serve Genaro was not fatal to the proceedings. In deciding this appeal we have considered and passed upon no questions except those arising upon the objections made and considered in the district court. The authorities from this court, namely, State ex rel. Enderlin State Bank v. Rose, 4 N. D. 319, 26 L.R.A. 593, 58 N. W. 514 and State ex rel. Atty. Gen. v. District Ct. 13 N. D. 211, 100 N. W. 248, relate to facts so materially differentiating them from the case at bar as not to be in point.

The order and judgment appealed from are reversed.

HUFFMAN v. BOSWORTH et al.

(140 N. W. 672.)

Action — damages — prairie fire — insurance — evidence.

1. In an action to recover damages for negligently setting a prairie fire which destroyed plaintiff's grain, the testimony of one C., an insurance agent, to the effect that one W., a stranger to the suit, caused such grain to be insured

in his name and that after the fire he collected the insurance thereon, all of which facts took place without plaintiff's knowledge or consent, was inadmissible and properly excluded.

Instructions — negligence — ordinary care — nonprejudicial.

2. Instructions defining negligence and ordinary care, examined and *held*, nonprejudicial.

Instructions — jury — misleading.

3. Certain instructions were improperly given relative to a matter regarding which there was no basis in the evidence, *held*, that the giving of such instructions could not have misled the jury and were nonprejudicial.

Filed February 5, 1913. Rehearing denied March 22, 1913.

Appeal from District Court, Morton County; *Crawford,* Special J.

From a judgment in plaintiff's favor, and from an order denying a motion for a new trial, defendants appeal.

Affirmed.

W. H. Stutsman, for appellants.

The defendants were not required to equip their engine with the best modern appliances. Shotwell v. Harrison, 30 Mich. 180.

They were only required to use such well-known apparatus as experience has shown to be reasonably adequate for the purpose. Holman v. Boston Land & Security Co. 20 Colo. 7, 36 Pac. 797.

B. W. Shaw, for respondent.

The word "judgment," as used in the courts' instructions, is synonymous with the word "prudence," and is nonprejudicial. Joseph Garneau Cracker Co. v. Palmer, 28 Neb. 307, 44 N. W. 464.

It is negligence *per se* for one to set or cause to be set on fire any woods, marsh, or prairie,—except in months of July and August. Rev. Codes 1905, § 2061; Kelley v. Anderson, 15 S. D. 107, 87 N. W. 579.

Where the instruction is inapplicable to the facts established, such error is not necessarily misleading and prejudicial, and, where it is not so, it affords no ground for reversal. Merchant v. Pielke, 10 N. D. 48, 84 N. W. 574.

Fisk, J. Plaintiff recovered a judgment in the court below against the defendant, for the sum of $315 as damages for the destruction by

fire of four stacks of wheat, which fire is alleged to have been started by the negligence of the defendants while transporting a traction engine and threshing rig along the public highway in the vicinity of such stacks. Two causes of action or grounds for recovery are alleged in the complaint,— one based upon the theory that such fire was started through the negligence of defendants in emptying the fire box of their engine upon the side of the road, without taking proper precautions to prevent the setting of fire to the adjacent prairie; and the other based upon the theory that the fire was caused by sparks negligently permitted to escape from the smokestack of such engine. The latter ground of recovery was, however, wholly abandoned by plaintiff, and no proof thereof was offered at the trial.

The appeal is both from the judgment and from an order denying a motion for a new trial.

Errors are assigned as follows:

"1. The court erred in striking out the testimony of L. N. Cary regarding the payment of the insurance upon the wheat to Fred Wolf.

"2. The court erred in instructing the jury upon the definition of negligence and ordinary care.

"3. The court erred in instructing the jury that a greater degree of care is necessary where the fire is pulled out on the road.

"4. The court erred in instructing the jury upon the issue of the fire being started by sparks from the smokestack, and upon the handling and care of the engine.

"5. The court erred in instructing the jury that defendants' engine was required to be equipped with the best modern appliances for the prevention of the escape of fire."

The first assignment of error is, we think, without merit. The testimony of the witness L. N. Cary, was clearly inadmissible, and was properly stricken out on plaintiff's motion. His testimony, in effect, merely tended to show that a third person, a stranger to the litigation, procured to be issued to him a policy of insurance covering such grain, and that he collected such insurance from the insurance company after such fire. Plaintiff is not shown to have had any connection with, or even knowledge of, such insurance, and received no benefit therefrom. It developed, on cross-examination of plaintiff, that this third person, one Wolf, was the owner of the land on which the grain was grown, and

had leased such land to plaintiff, who was to pay to Wolf as rent, one fourth of the crops, when threshed, but the undisputed evidence is that plaintiff owned three fourths thereof. Surely plaintiff is in no way bound by the acts of Wolf in procuring such insurance, or in collecting moneys from the insurance company to which he was not entitled, plaintiff having no knowledge thereof. Were the rule as appellant contends, then plaintiff could be deprived of his property rights without his knowledge or consent. If Wolf, at the time of the fire, owned a one fourth part of such grain, then the court very properly restricted plaintiff's recovery to the value of the three fourths interest owned by him; but the ruling striking out Cary's testimony was clearly correct, as such testimony was wholly incompetent to rebut the positive proof in the case as to plaintiff's ownership of the grain.

Error is next assigned upon that part of the instructions defining the terms "negligence" and "ordinary care." Upon this point the instruction is as follows:

"Negligence is defined in law, and that term, as used in these instructions, means the failure to exercise ordinary care. Negligence is failure in the matter of care under the circumstances. Every man is bound to be careful that others take no harm by his conduct or his actions. The measure of his duty is the circumstances of the case. What may be absolutely necessary under some circumstances to prevent others from harm may not be necessary under other circumstances. Negligence, as I have said, is the lack of care under the circumstances; is the doing of something which, under the circumstances and in view of his duty to endeavor to prevent other people's property from harm by reason of his conduct, a reasonable and prudent man would not do. It is a failure to do something which a man of good judgment and sound common sense would do in view of the circumstances out of a desire to perform his duty to protect other people's property from harm by reason of his actions."

While such instruction is not to be commended, we are not inclined to condemn it as fatally erroneous and prejudicial. With the exception of the last sentence, such instruction is above criticism; and we are not willing to hold that the latter portion, when taken in connection with what preceded it, had any tendency to confuse or mislead the jury. The entire testimony is not before us, and, in the absence of such testimony,

we are unwilling to say that the giving of such instruction was in the least prejudicial to defendants, even though when considered abstractly it might be deemed somewhat faulty. Such instruction is not without support in the authorities. Foote v. American Product Co. 201 Pa. 510, 51 Atl. 364; Foster v. Union Traction Co. 199 Pa. 498, 49 Atl. 270.

There is no proof that the fire was caused by the escape of sparks from the smokestack of the engine, and, as before stated, plaintiff abandoned this alleged ground of recovery. The evidence does disclose, however, that defendants emptied the fire box of this engine in the road, and the proof is undisputed that there was dry grass on either side of the roadway and in close proximity thereto; and we think the proof is quite conclusive that the fire started from live coals thus dumped from the engine, and which were, by the wind, communicated to such dry grass, causing the prairie fire which destroyed plaintiff's grain. If so, this was culpable negligence on defendants' part, or, at least, the instructions complained of were as favorable to them as the law required. Defendants were bound to know that live coals left in close proximity to dry prairie grass on a windy day constituted a highly dangerous agency, and the law exacted of them a high degree of care under such conditions. To say that they were bound to exercise "good judgment and sound common sense" in extinguishing such live coals in order to prevent them from setting fire to the prairie grass, under the circumstances, is not, in our judgment, stating it too strongly. In this connection see § 2061, Rev. Codes 1905, and Kelley v. Anderson, 15 S. D. 107, 87 N. W. 579.

The instruction complained of in the appellants' third assignment of error is somewhat indefinite, but, when considered in connection with the entire charge to the jury, we think the same was nonprejudicial. What we have said regarding the last assignment sufficiently disposes of appellants' contention under this assignment.

It is appellants' next contention that it was prejudicial error to instruct the jury relative to the second cause of action or the alleged ground of recovery that the fire was caused from sparks negligently permitted to escape from the smokestack of the engine, whereas such ground of recovery had been practically abandoned and no proof offered by plaintiff in its support. It is undoubtedly true that such instruction had no proper place in the case, and should have been omitted; but we

fail to see how the same could have misled the jury to any extent, for, by applying such instruction to the evidence, the jury could not possibly have found in plaintiff's favor, there being no evidence to support such a finding. It does not follow that an instruction which is inapplicable to any evidence in the case is necessarily prejudicial, where it appears that such instruction could not have misled the jury. Merchant v. Pielke, 10 N. D. 48, 84 N. W. 574.

The foregoing, we think, sufficiently answers the various contentions of appellants' counsel. Finding no prejudicial error in the record, the judgment and order appealed from are affirmed.

STATE v. McGILLIC.

(141 N. W. 82.)

The state appeals from an order sustaining a demurrer to a criminal information framed to charge a landlord with knowingly permitting his premises to be used by a tenant for the purpose of violating the prohibition laws, and contrary to the provisions of chapter 193 of the Session Laws of 1907. *Held:*

Information — charging part — intoxicating liquors — place — description.

(1) That the charging part of an information alleging that the defendant "did unlawfully and knowingly permit a portion of a building controlled by him [described], and located in said city of Mandan, to be used as a place where intoxicating liquors were sold . . . as a beverage," sufficiently charges the offense defined by one portion of chapter 193 of the Session Laws of 1907.

Words — interest — lessor — premises.

(2) That the words "controlled by him" sufficiently characterize the necessary proprietary interest of the lessor in the premises leased.

Crime — leased premises — owner — agent — interest.

(3) That the statute defines the commission of the crime by persons other than those having the interest of owner or agent in the premises leased, and that the doctrine of *ejusdem generis* does not apply to limit the persons who

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Note.—As to knowledge necessary to charge owner with conduct of tenants or others in selling liquor on premises in violation of an injunction, see note in 25 L.R.A.(N.S.) 602.

may violate the statute to those having only the interest of an owner, or agent for an owner, in the leased premises so permitted to be unlawfully used.

Nuisance — keeper — interest — property.

(4) Chapter 193 of the Session Laws of 1907 was enacted to supplement § 9373 of the Revised Codes of 1903, and the term "controlled by him," that would be sufficient under that section to charge the interest required of a nuisance keeper, is sufficient to charge the property interest of a lessor to an alleged nuisance keeper.

Statute — constitutionality — title of act — subject-matter.

(5) The statute is constitutional, the title sufficiently covering the subject-matter of the enactment.

Opinion filed March 27, 1913.

An appeal from the District Court for Morton County; *Crawford,* Special J.

Reversed and case remanded.

Andrew Miller, Attorney General, *Alfred Zugar, F. C. Heffron,* and *C. L. Young,* Assistant Attorneys General, for appellant.

The crime of keeping and maintaining a common nuisance, as defined by the prohibition law of this state, may be committed by one who is in control of the building or place. Such person is in the same class as the "owner" or "agent," and is responsible. Jensen v. State, 60 Wis. 577, 19 N. W. 374; 21 Am. & Eng. Enc. Law, 1011–1014.

It is sufficient in law to constitute the offense, if it is *permitted* that a building be so used. Crofton v. State, 25 Ohio St. 249, 2 Am. Crim. Rep. 378; Mansfield v. State, — Tex. Crim. Rep. —, 24 S. W. 901.

B. W. Shaw, for respondent.

The statute is directed against the "owner," "agent," or "other person." Such "other person" must belong to the same class. The doctrine of *ejusdem generis* applies. State v. Prather, 79 Kan. 513, 21 L.R.A.(N.S.) 23, 131 Am. St. Rep. 339, 100 Pac. 57; 36 Cyc. 1119, 1120; State v. Campbell, 76 Iowa, 122, 40 N. W. 100; State v. Stoller, 38 Iowa, 321.

Penal statutes are not to be construed or extended so as to embrace, by implication, cases or acts not clearly within the prohibition of the statute. State v. Prather, 79 Kan. 513, 21 L.R.A.(N.S.) 23, 131 Am.

St. Rep. 339, 100 Pac. 57; United States v. Wiltberger, 5 Wheat. 95, 5 L. ed. 42.

Portions of the act not expressed or covered in its title are void. Const. § 61.

Goss, J. The state appeals from an order of the district court sustaining a demurrer to a criminal information. As our holding sustains the information under attack, it is set out in full, that it may constitute a form adjudicated as sufficient in prosecutions for such violations of chapter 193 of the Laws of 1907, as are sought to be covered thereby. The information reads:

Information.

H. R. Bitzing, state's attorney in and for said county of Morton and state of North Dakota, in the name and by the authority of the state of North Dakota, informs this court that heretofore, to wit, on the 3d day of May, 1910, and on divers other days and times between said date and the 1st day of December, 1910, at the city of Mandan, in the county of Morton, and state of North Dakota, one Patrick McGillic, late of the county of Morton and state aforesaid, did commit the crime of knowingly permitting a building to be used for the purpose of unlawful dealing in intoxicating liquors, in violation of chapter 193 of the Laws of North Dakota for 1907, committed in the manner following, to wit:

That at said time and place the said Patrick McGillic, being then and there the duly elected, qualified, and acting police commissioner of the city of Mandan, did unlawfully and knowingly permit a portion of building controlled by him, namely, a suite of rooms upstairs in the building known as "the Pioneer Block," and also known as "the McGillic and Olson Building," located in said city of Mandan, to be used as a place where intoxicating liquors were sold, bartered, exchanged, and given away as a beverage, and as a place where persons were permitted to resort and did resort for the purpose of drinking intoxicating liquors as a beverage, and as a place where intoxicating liquors were kept for sale, barter, exchange, and delivery as a beverage, in violation of chapter 193 of the Laws of North Dakota for 1907, and contrary to the stat-

utes in such case made and provided, and against the peace and dignity of the state of North Dakota.

To this information a general demurrer is interposed "on the ground that the information does not state facts sufficient to constitute a public offense." Under this, respondent urges that the information is deficient in that it nowhere contains the words "owner" or "agent" of the statute defining the offense, nor does it charge that an owner or agent let any building for such purposes, or knowingly permitted such use; and that by alleging simply that the defendant "did unlawfully and knowingly permit a portion of a building controlled by him," and described, to be used for such purposes, it is insufficient to charge a crime under said chapter 193 of the Laws of 1907. He contends "that the controller of a building does not necessarily belong to the same class as the owner, agent, or other person who directly or indirectly lets any building, knowing that it is to be used for such unlawful purpose. A person may be in control of a building, who has by force, intimidation, fraud, or stealth entered upon the prior actual possession of another and detains the same; or when, after entering peaceably upon the real property, turns out by force, threats, or menacing conduct the party in possession; or when he, by force or by menaces and threats of violence, unlawfully holds and keeps possession of any real property, whether the same was acquired peaceably or not; or when a lessee, in person or by subtenant, holds after the termination of his lease or expiration of his term; or when a party continues in possession after sale of the real property under mortgage, execution, order, or any judicial process, after expiration of the time fixed by law for redemption and after execution and delivery of a deed; or when a party continues wrongfully in possession after judgment in partition, or after a sale under an order or decree of the county court. In each of these cases the person would be in control of the premises, but it could not be said that he was in control as the owner or agent who would have the right to let the premises or permit their use for any purpose. The 'other person' referred to in the statute is one who has, like the 'owner or agent of the owner,' the lawful right to let the premises." It is contended by respondent that the offense under this statute can only be committed by "the owner, agent, or other person belonging to the same class, who leased or let

the building for the unlawful purpose, and cannot be committed by any such person who merely knowingly permitted the building to be used for such unlawful purpose; that the 'other person' in this statute is someone who has the same right to let the building for the unlawful purpose as the owner or the agent of the owner; that the doctrine of *ejusdem generis* applies."

We recite at length the foregoing argument of respondent. He has been diligent in bringing to the attention of the court many instances mentioned to emphasize his contention that the statute strikes at only an owner, or an agent of an owner, or a person in the same class possessing, as does such agent or owner, the presumed right or actual right to sublet.

In the construction of statutes the court must keep in the forefront the legislative purpose,—the reason which prompted the enactment. With a knowledge of this, and knowing what was intended to be covered, the statute should then be scrutinized in the light of such purpose, to determine whether it is broad enough, under a reasonable construction of it, to place the ban upon the acts intended by the legislature to be condemned. Accordingly, we should now determine the reason for the act, and what it was sought to remedy thereby, and whether under a reasonable construction the legislation embraces the matters intended to be covered.

We find that chapter 193 of the Laws of 1907 was obviously enacted to supplement § 9373 of the Revised Codes of 1905, and other portions of our so-called prohibition law. It particularly supplements the common-nuisance feature of the old law. That law is aimed primarily at a place wherein is permitted the commission of acts violative of the prohibition law, the statute condemning the place of the violations by declaring it to be a common nuisance. The person in control or charge, whether temporarily or continuously, is the keeper of such nuisance and the person punishable for its maintenance. And in prosecutions under the prohibition laws it is a well-known fact, of which the court may take judicial notice as a matter of common knowledge, "known to all men of ordinary understanding and intelligence," (§ 7139, subdiv. 68, Rev. Codes 1905), that under the law prior to chapter 193 the owner might lease to a tenant or permit an occupant to use, control, and occupy a place wherein a nuisance might be maintained by such lessee, oc-

cupant, or person in control, without the owner being criminally liable, unless the state could prove such facts as would render the owner liable as a joint principal in the unlawful business. And proof of mere letting, leasing or permitting of a tenant or occupant to occupy premises, with proof that the place is conducted as a common nuisance by the tenant, was insufficient alone to fasten criminal responsibility upon the landlord, even though he had actual knowledge of the use to which the leased premises were put, so long as the landlord did no overt act toward the conduct of the tenant's unlawful business. The mere leasing a building, knowing that it may be so used, did not render the owner criminally liable. To bring criminal responsibility home to an owner, agent, or any other person having the right to sublet, and who, with knowledge that the place to be leased or occupied was to be used as a common nuisance, leases to a tenant premises to be so used, or otherwise permits its use for such unlawful purpose, was the object sought by and the purpose for the enactment of this statute. Clearly the legislature had in mind the wrong in the owner escaping criminal liability in leasing his property for such nefarious purposes, and by this legislation has manifested an intent to bring "every owner, agent, or other person" so letting or permitting such unlawful use of premises under criminal condemnation. Cognizant of the defect in the existing law,—knowing well the legislative purpose so plainly evident,—it is the duty of this court to so interpret the statute as to give full effect to that legislative purpose, if such result is possible, by following the usual rules of interpretation of penal statutes.

This brings us to an analysis of the statute itself; and the first thing that is noticeable is that it, like the common nuisance statute, § 9373, concerns primarily a place,—any building used as a common nuisance or wherein the prohibition law is violated. The statute covers: (1) An owner or agent as a lessor, and (2) any licensor, permitter, or person other than a lessor who shall knowingly permit any building to be so used. Stripped of qualifying clauses, the statute reads: (1) "Every owner, agent, or other person who lets any building, knowing it is to be used (as a common nuisance), or (2) (every owner, agent, or other person) who otherwise (than by letting) permits any building to be so used" (as a common nuisance), is guilty of a misdemeanor. The statute is so definite as to an owner or agent of an owner, who knowingly

permits any building to be so used, as to be beyond the necessity for interpretation. The words "owner," "agent" (of an owner), "let," and "permit," each and all, are terms from which may be presumed rights of ownership, inclusive of right to lease and right to permit; and an information charging a defendant, either as owner or agent, with letting or permitting such unlawful use of a building, clearly charges the crime at which the statute is aimed, and must be obviously within the statute.

But this information demurred to is designed to charge the "other person" of the statutory designation of "owner, agent, or other person," with "otherwise" (than by letting) knowingly permitting a building to be so used as a common nuisance; and in order to characterize the "other person," and bring him within the class aimed at by the statute as having the right to lease or grant the right of use as is presumed from the terms "owner or agent," the information has charged defendant with knowingly permitting such unlawful use of a building "controlled by him." Whether the word "control" sufficiently characterizes the legal interest that such "other person" than owner or agent shall have in the property to constitute a charge of the violation of the law through letting or otherwise permitting any building to be so used is the question. It is true that a person, to be guilty of letting or permitting, within the meaning of the statute, must have some interest or right different from that of all the world, otherwise he does not "let" or "permit" such use. The word "owner" implies the right to let or permit; likewise does the term "agent of the owner" imply the right to lease or permit such use. And the legislature, by using the general term, "or other person," in connection with the words "owner" or "agent," and with the verbs "let" and "permit," must have meant any person other than an owner or an agent who shall possess the power to lease or permit such unlawful use. We cannot agree with respondent's contention that the words, "or other person," were not intended to enlarge the scope of the statute as to the property interest of the lessor or permitter in the property let or permitted to be so used. The doctrine of *ejusdem generis*, here invoked by him, amounts, as is said in Lewis's Sutherland, Statutory Construction, § 437, to but "a mere suggestion to the judicial mind that, where it clearly appears that the law-maker was thinking of a particular class of persons or objects, his words of more general description may not have been intended to embrace any

other than those within the class. The suggestion is one of common sense. Other rules of construction are equally potent, especially the primary rule which suggests that the intent of the legislature is to be found in the ordinary meaning of the words of the statute. . . . The doctrine of *ejusdem generis* yields to the rule that an act should be so construed as to carry out the object sought to be accomplished by it, so far as that object can be collected from the language employed." We believe the legislative intent was not to limit the operation of this statute to but owners or agents of owners, but, on the contrary, it was intended to cover licensors and all persons exercising dominion under apparent and asserted legal right, and who are guilty of the commission of the specific prohibited acts of such leasing or letting. Such must follow from the interpretation of the ordinary language of the statute in the light of the reasons moving its enactment and the purpose sought by it; and this alone, under all the authorities, sweeps aside the doctrine of *ejusdem generis*, and renders it without value in considering this statute. 36 Cyc. 1121; Pein v. Miznerr, 41 Ind. App. 255, 83 N. E. 784–786; United States Cement Co. v. Cooper, 172 Ind. 599, 88 N. E. 69; Mertens v. Southern Coal Min. Co. 235 Ill. 540, 85 N. E. 743; Martin v. State, 156 Ala. 89, 47 So. 104; Nephi Plaster & Mfg. Co. v. Juab County, 33 Utah, 114, 14 L.R.A.(N.S.) 1043, 93 Pac. 53; Winters v. Duluth, 82 Minn. 127, 84 N. W. 788, all abundantly support this conclusion.

And we see no good reason why this statute should not receive interpretation similar to that given for years by courts in characterizing the authority of the terms "owner" or "keeper" of the common nuisance under § 9373. This act is intended to supplement and render more effective the provisions of § 9373, by subjecting to punishment "owners, agents, or other persons" just without its reach, not actually keeping and maintaining the nuisance, but nevertheless really responsible for the possession of the keeper thereof. A person is sufficiently proven to be such a nuisance keeper when once control, even though temporary, of the place and unlawful business, is shown. And likewise, the lessor or permitter to such keeper should be sufficiently and prima facie proven a law violater when it is established that such owner, agent, or other person in control, real or apparent, has leased the place to the keeper of such unlawful business, with knowledge of such use, or knowing that it

was intended to be so used. If the person in mere control of the business is a keeper, the superior in control who has leased to the keeper, that he might control for unlawful use, should be within this statute, and is evidently, from its terms, within it, inasmuch as the statute does not specifically require a definite property interest in the premises leased. It is as general as to that as it is to the leasing or permitting of the unlawful use, and hence was intended to be as broadly construed in this as in such particulars. By its terms it covers all who "directly or indirectly let any building," and is designed to defeat any indirect letting or attempted round-about evasion as to leasing. Certainly this portion must be liberally construed. Likewise the term, "or who otherwise permits any building to be so used," must be broadly construed, as is evident from the term "otherwise" and the general inclusive word "permit," evidently designed to cover any occupancy by permission other than held by actual lease. Certainly these are strongly indicative that the terms "every owner, agent, or other person who" commits these acts, should also be given a construction that at least will give effect to every such word of this statute including "or other person." Of course, respondent cites the common-law rule for construction of penal statutes, that they should be strictly construed, and not be extended by implication to embrace cases or acts not clearly within the prohibition of the statute, which rule is, however, as to the construction of a statute, to be considered with § 8538, Rev. Codes 1905, expressly providing that "the rule of the common law, that penal statutes are to be strictly construed, has no application to this [Penal] Code. All its provisions are to be construed according to the fair import of their terms, with a view to effect its objects and to promote justice."

Our conclusion is that the information charging that the defendant did unlawfully and knowingly permit a portion of a building controlled by him to be so used sufficiently charges the crime of knowingly permitting a building to be used for the purpose of unlawfully dealing in intoxicating liquors, under chapter 193 of the Laws of 1907; and that the words, "controlled by him," sufficiently characterize and charge the proprietary interest of the defendant in the building or portion thereof permitted by him to be so used; and that a person in control of a building who permits such use thereof is included within the statute as one of those coming within its ban and as within the general des-

ignation of "every owner, agent, or other person" who commits such acts is guilty of the offense charged. It follows, therefore, that on proof of actual control as would be presumed from leasing, acceptance of rent of the keeper, acts of dominion tending to show ownership and prima facie control for rental purposes, the state would establish its prima facie case under a charge as here made of permitting such unlawful use. Whether anything short of proof of ownership or proof of agency for an established owner would suffice under a charge of leasing or permitting unlawful use by an owner or agent of an owner, we do not decide.

Of course the parenthetical allegation in the information, "being then and there the duly elected, qualified, and acting, police commissioner of the city of Mandan," was not inserted in said information to charge that defendant, in such official capacity, asserted control over said premises, or to make him criminally liable because of his being such an officer, or because of any nonfeasance or act of omission of his as a public official. But it is charged because of the statutory provision for summary removal by the court from public office of any official convicted of such offense. The allegation to that effect in said information presents no issue on the question of guilt or innocence, but concerns something of which the court may take judicial notice and instruct the jury as a matter of law as to whether such official is a public officer.

Respondent also urges that the second portion of the statute, being that part thereof under which this information is framed, and concerning the otherwise permitting of a building to be used as a common nuisance, is unconstitutional as a violation of § 61 of our state Constitution. Respondent contends that such portion of the act is broader than the title. He says that as the title concerns only the letting of a building or portion thereof knowingly for such unlawful purpose, it does not cover the portion of the statute aimed at, permitting such use other than by leasing. It is true that the first portion of the statute uses the term "letting" and has particular reference to the leasing of a building for such purpose, while the latter part of the statute also covers the permitting of such use otherwise than by leasing. But the whole matter is germane to the letting of a building for such unlawful purposes. The statute covers merely the different circumstances or methods whereby

permission, by lease or otherwise, may be given by an owner or a person in control to another to occupy a building or portion thereof as a place within which to violate the prohibition laws. Unless a title must amount to an index of the statute, this must be held sufficient. "If the legislature is fairly appraised of the general character of an enactment by the subject as expressed in its title, and all its provisions have a just and proper reference thereto, and are such as, by the nature of the subject so indicated, are manifestly appropriate in that connection, and as might reasonably be looked for in a measure of such character, then the requirement of the constitution is complied with. It matters not that the act embraces technically more than one subject, one of which only is expressed in the title, . . . so that they are not foreign and extraneous to each other, but 'blend' together in the common purpose evidently sought to be accomplished by the law." These are the words of State v. Cassidy, 22 Minn. 324, 21 Am. Rep. 765; and Winters v. Duluth, 82 Minn. 127, 84 N. W. 789, which last-named case is also on all fours with all of respondent's contentions. See also cases cited in McKone v. Fargo, 24 N. D. 53, 138 N. W. 967, on pages 971, 972; and Lewis's Sutherland, Stat. Constr. § 131. Clearly this statute refers to the single subject of making criminal the permitting of a building to be used for criminal purposes; and the title covering this purpose the act may contain "any provisions germane to the subject expressed, or which are reasonably related or incidental thereto, or which may aid or facilitate the accomplishment of the purpose expressed in the title." Lewis's Sutherland, Stat. Constr. § 145. Respondent cites no authorities, and we are satisfied none can be found supporting his contention, as the statute is not open to this attack.

Accordingly it is the order of this court that the order of the trial court sustaining the demurrer to the information be set aside, and that the judgment of dismissal, entered upon said order sustaining the demurrer, be also vacated and annulled, and that the district court enter an order overruling the demurrer to the information in lieu of the order made sustaining said demurrer, and that said action stand for trial, and further proceedings in no wise prejudiced by the order and judgment appealed from hereby directed to be vacated.

HARMENING v. HOWLAND.

(141 N. W. 131.)

Pleading — proof — exemplary damages — order — amendment.

1. Where the complaint alleges and the proof shows facts authorizing a recovery for exemplary damages, the same may be recovered under a claim for damages generally, without being specially pleaded. It is accordingly *held* that the order permitting an amendment of the complaint at the trial with reference to exemplary damages, was nonprejudicial.

Instructions — burden of proof — attorney and client — relationship.

2. An instruction placing the burden upon the defendant to show his good faith in doing the act complained of, in the event the jury should find that the relationship between the parties was that of attorney and client, *held* proper under the testimony.

Documents — identification — evidence — foundation.

3. At the trial, certain original documents in the United States Land Office and Department of the Interior, which concededly were relevant and material, were received in evidence over defendant's objection that they were incompetent for the reason that they had not been properly authenticated. The register of the local land office produced them in court, and identified them as original records of the Land Department relating to the land over which this controversy arose.

Held, that a sufficient foundation was laid for the introduction of such original documents.

Proof of public documents — best evidence — original documents — identification.

4. Subdivision 8, of § 7300, Rev. Codes 1905, and §§ 2469 and 2470 Revised Statutes of the United States, U. S. Comp. Stat. 1901, p. 1557, construed and *held* not to prescribe an exclusive method of proving public documents therein mentioned. The original documents, when properly identified as such, are the best evidence, and the statutes aforesaid were not intended to preclude such proof.

Fraudulent acts — exemplary damages — malice — fraud — deceit.

5. Defendant's contention that there is no sufficient foundation in the evidence to warrant the jury in allowing exemplary damages, *held*, without merit, there being ample testimony tending to show that, in committing the act complained of, defendant acted fraudulently and in total disregard of plaintiff's rights. To warrant exemplary damages, proof of actual malice is not necessary in all cases; and where the defendant, through fraud and deceit, intentionally induced the plaintiff to believe and to act upon the belief that

certain material representations were true when he knew them to be false, he is liable for exemplary damages.

Opinion filed March 27, 1913.

Appeal from District Court, Ward County; *K. E. Leighton,* J.

Action by August Harmening against John M. Howland. From a judgment in plaintiff's favor, defendant appeals.

Affirmed.

Facts.

Action to recover damages suffered by plaintiff by reason of alleged fraud and deceit practised upon him by defendant, concerning the dismissal of a certain contest pending in the United States Land Office, against the land described in the complaint, and upon which land plaintiff made homestead entry under the direction of defendant. The case was tried before a jury, and a verdict returned in favor of plaintiff, assessing the damages at $3,000. Defendant appeals from such judgment. No motion for a new trial was made in the trial court. Defendant offered practically no testimony, and the following facts are uncontroverted:

In the spring of 1902, plaintiff arrived in Kenmare to select a homestead on government land in that vicinity. At that time defendant maintained an office at said place as a land attorney, engaged in locating people on land, conducting contests, final proofs, etc. He had been admitted to practise before the Department of the Interior and the United States Land Office at Minot.

Immediately prior to this time, he had had a partner by the name of Campbell, and their business had been conducted as Howland & Campbell. A man by the name of Kitter was a locator, and brought more or less business to defendant's office. Plaintiff was brought to defendant's office by Kitter. He desired to make homestead entry on the land described in the complaint, and defendant represented to him that he was an attorney conversant with land-office practice, and that he would obtain for him a valid filing on the land, and deliver to him a valid dismissal of the pending contest.

At this time the land in question was covered by the homestead entry of one John Kiell. Kiell had abandoned the land, and had gone to Minnesota. He had executed a relinquishment, and forwarded the same to a bank at Kenmare, to be delivered to Kitter subject to payment of $40 for the same. At this time, however, there was pending against the homestead entry of Kiell a contest filed by one Fargen. Howland & Campbell were the record attorneys in this contest for Fargen. The written power of attorney given by Fargen to Howland & Campbell gave said attorneys full authority over the contest in all matters save and "except to dismiss this contest." If Kiell's relinquishment was filed in the land office without being accompanied by a valid dismissal of this contest, of course Fargen, under the United States laws, would have a preference right to file on the land. The defendant drew up in his own handwriting a dismissal of this Fargen contest. He also prepared a complete set of homestead filing papers for plaintiff, and went to the bank with him and Kitter, where plaintiff deposited in escrow $200 in cash and a $25 promissory note. He obtained from the bank the Kiell relinquishment, and turned all of these papers over to plaintiff, instructing him to take the papers to Minot and file the same with the land office, giving him a letter requesting attorney Barret of Minot to assist him in getting these papers filed with the land office. Relying on defendant's representations, plaintiff filed on the land, and the land office issued to him the customary filing receipt. Thereupon the money deposited at the bank by plaintiff was released. Defendant claims that he received only $100 of the money. Forty dollars of the same was remitted to Kiell by the bank. The balance, $60, probably went to Kitter. In any event, if Kiell got the $40 from the bank, defendant received more than one half of the entire proceeds. Fargen never received any of the money, by reason of the sale of the contest dismissal. He knew nothing concerning this transaction, and did not know that his attorney had dismissed his contest. On learning of such facts, he began proceedings in the land office to have his contest, which had been dismissed by defendant without right, reinstated. Plaintiff was made a defendant in these proceedings, and upon advice from defendant and others he defended the proceedings, and did everything within his power to maintain his homestead entry on the land. Such proceedings were carried through the customary procedure of the United States

Land Office and Department of the Interior, and Fargen finally won, and plaintiff's homestead entry was canceled and Fargen filed on the land. The Department held that the action of defendant, in wrongfully dismissing the Fargen contest, was a mere nullity, and could not in any manner affect Fargen's rights, inasmuch as Fargen had expressly reserved in the power of attorney given to defendant, the right to dismiss the contest. These proceedings were not finally terminated until 1908. From the time plaintiff filed in 1902 until he was finally ejected from the land in 1908, he resided upon the land, erected valuable buildings, made a home thereon for his family, improved the land, and broke and cultivated about 100 acres of the same.

Appellant makes no point concerning the items and measure of damages, except as to the allowance of exemplary damages. The answer admits that Kiell made the homestead entry in question; that Fargen contested the same; that "Campbell & Howland" were attorneys for Fargen; that Howland drew up plaintiff's homestead application, and that plaintiff filed on the land in question. At the trial it was stipulated that Exhibits 13, 18, 19, 20, and 21, which are the dismissal of the Fargen contest and the plaintiff's filing papers, are part of the records of the United States Land Office and Department of the Interior.

Palda, Aaker, & Greene, for appellant.

To justify a recovery, it was necessary that plaintiff show not only fraud, either actual or constructive, practised upon him by defendant, but also that it resulted in substantial loss or detriment to plaintiff. Proof of original documents in any of the departments of the United States government can only be made as by law provided. Rev. Codes 1905, § 7300, subdiv. 8; U. S. Rev. Stat. §§ 2469, 2470, U. S. Comp. Stat. 1901, p. 1557, as amended by act of April 2, 1888.

G. S. Wooledge and *Francis J. Murphy,* for respondent.

It is not necessary to plead exemplary damages *"eo nomine"* in the complaint. They may be recovered under a claim for damages generally. Shoemaker v. Sonju, 15 N. D. 518, 108 N. W. 42, 11 Ann. Cas. 1173; 13 Cyc. 177, and cases cited.

The original documents of the departments of the United States government, properly identified, are the best evidence. This is true of any public records. Jones, Ev. 2d ed. § 525; Grandin v. LaBar, 3 N.

D. 446, 57 N. W. 241; Jesse D. Carr Land & Live Stock Co. v. United States, 55 C. C. A. 433, 118 Fed. 821; Campbell v. Laclede Gaslight Co. 119 U. S. 445, 30 L. ed. 459, 7 Sup. Ct. Rep. 278; Galt v. Galloway, 4 Pet. 336, 7 L. ed. 878; Fothergill v. Stover, 1 Dall. 6, 1 L. ed. 13; Fisher v. Betts, 12 N. D. 197, 96 N. W. 132; Merced County v. Fleming, 111 Cal. 46, 43 Pac. 392; 20 Century Dig. Ev. 1273–1278; 8 Am. Dig. Decen. ed. Ev. 366, 367; 10 Enc. Ev. 388–395; Roper v. Clabaugh, 4 Ill. 166; Ansley v. Peterson, 30 Wis. 658; Re McClellan, 20 S. D. 498, 107 N. W. 681; State v. Paulson, 27 S. D. 24, 129 N. W. 558; State v. Walsh, 25 S. D. 30, 125 N. W. 295; Kellogg v. Finn, 22 S. D. 578, 133 Am. St. Rep. 945, 119 N. W. 545, 18 Ann. Cas. 363; Miller v. Northern P. R. Co. 18 N. D. 19, 118 N. W. 344, 19 Ann. Cas. 1215.

Fisk, J. (after stating the facts as above). Appellant assigns twenty-seven alleged errors, all relating to the trial court's rulings and instructions. Such as are referred to at all in the printed brief and argument are argued only in a general way by grouping the assignments under a few points which we will consider in the order presented.

It is first contended that it was prejudicial error to permit plaintiff, at the conclusion of his case, to amend the complaint by adding thereto an allegation and prayer for exemplary damages. There is no merit in this contention. The amendment was wholly unnecessary, but it did no harm. This court has expressly held that such damages may be recovered under a claim for damages generally. Shoemaker v. Sonju, 15 N. D. 518, 108 N. W. 42, 11 Ann. Cas. 1173.

The second contention made by appellant challenges the correctness of a certain instruction relative to the burden of proof as to the good faith of defendant in furnishing to plaintiff the dismissal of the Fargen contest and the Kiell relinquishment, in the event the jury should find from the evidence that the relationship of attorney and client existed between the parties at the time of the transaction in question. No claim is made that such instruction does not state a correct rule, but it is insisted that there is no foundation in the testimony authorizing the same; but, after an examination of such testimony, we are agreed that the jury was fully justified in finding that such relationship did in fact exist. We shall not take the time nor the space necessary to a

review of such testimony in this opinion, as to do so would serve no useful purpose.

It is next contended in effect that there is no competent proof in the record that a final decision was rendered by the United States Land Department upholding Fargen's contest and canceling plaintiff's entry for the land described in the complaint. It is apparently not questioned that certain original documents introduced in evidence from the Land Office Department, if properly authenticated, are sufficient to furnish such proof, but appellant contends that the same were not thus authenticated. In this connection counsel calls our attention to § 7300, Rev. Codes 1905, subdiv. 8, and to §§ 2469, 2470, United States Revised Statutes, U. S. Comp. Stat. 1901, p. 1557. But these statutes merely prescribe a method by which such proof *may* be made. They permit of this easy and simple way of proving public documents, but such methods are by no means intended to be exclusive. It would, indeed, be strange if either the legislature or Congress, by such enactments, had thereby intended to preclude a higher quality of proof than that mentioned in the statutes, such as the originals would furnish. Such originals were, of course, the best evidence when properly identified. That they were properly identified is, we think, entirely clear. Such original documents were produced in court and identified as such by the register of the local land office. That such official, as the custodian thereof, was a proper person to thus identify these exhibits, is too clear for serious discussion. The proof thus furnished was ample to establish the fact that the Fargen contest was finally sustained and plaintiff's entry canceled, as well as the facts as to the other proceedings had in the United States Land Office relative to such land. Jones, Ev. 2d ed. § 525; Grandin v. LaBar, 3 N. D. at p. 457, 57 N. W. 241; Jesse D. Carr Land & Live Stock Co. v. United States, 55 C. C. A. 433, 118 Fed. 821; Campbell v. Laclede Gaslight Co. 119 U. S. 445, 30 L. ed. 459, 7 Sup. Ct. Rep. 278; 32 Cyc. 1044, 1045.

The proof furnished by such land office records is, moreover, materially supplemented by other testimony in the case which is uncontroverted.

Finally it is urged by appellant's counsel that there is no sufficient foundation in the record upon which to base a verdict for exemplary damages, and that it was prejudicial error, therefore, to submit such

question to the jury. Counsel frankly concedes that the question as to the sufficiency of the evidence to justify the verdict on this issue is not properly before us, but their contention is that proof of facts authorizing exemplary damages is wholly lacking. We cannot thus read the record. We think there is ample testimony on which the jury was warranted in finding that defendant knew that he had no authority to dismiss the Fargen contest, and that in attempting to do so he acted fraudulently and in total disregard of the rights of plaintiff and of the disastrous consequences which might thereby befall him, and by such act he misled him to his great damage. To warrant exemplary damages, proof of actual malice was not necessary. If the defendant intentionally, through fraud and deceit, induced the plaintiff to believe and to act upon the belief that such purported dismissal of the Fargen contest was authorized, he must suffer the consequences, and is not immune from the imposition of punitive damages. Whether the defendant was guilty of such conduct was, under the evidence, a question essentially for the jury; and while the amount of the jury's verdict seems somewhat large, we are not prepared to say, nor are we asked to hold, that such amount is excessive. Manifestly, under the record, it is difficult, if not impossible, to measure with any degree of accuracy the actual damages suffered by plaintiff; and it may be, as respondent's counsel contend, that the damages awarded are wholly inadequate to redress the injury inflicted on plaintiff's rights by defendant's wrongful conduct.

Finding no error in the record, the judgment is affirmed.

LOWN, Trustee, v. CASSELMAN.

(141 N. W. 73.)

An attorneys' lien was filed against a judgment entered, and the clerk indorsed upon the judgment docket the words, "attorney's lien for $300, claimed by C. J. Murphy, attorney for plaintiff." The judgment debtor then filed a pe-

Note.—For an extensive discussion of the subject of liens of attorneys, see notes in 51 Am. St. Rep. 251 and 31 Am. Dec. 755.

tition in voluntary bankruptcy. He scheduled Lown as a judgment creditor, but did not list or mention Murphy's attorney's lien in his schedule of debts. Murphy received no notice of the bankruptcy proceedings, and did not participate in them. The usual discharge in bankruptcy was entered in the Federal court. The bankrupt, C., exhibiting the discharge, applied for an order discharging the judgment of record. The court denied a discharge as to the por tion of the judgment to the amount of the attorney's lien, $300 and interest, from which order C. appeals. *Held:*—

Attorneys — lien — bankruptcy — notice of — discharge — statute — docket entry.

(1) The attorney's lien was valid, and the docket entry thereof was a sufficient compliance with this statute.

Lien — attorneys — judgment — assignment.

(2) The lien constituted an equitable assignment to that amount of the judgment.

Judgment creditor — lien — docketing — notice.

(3) The interest of Murphy in the judgment was not discharged by the bankruptcy proceedings.

Judgment — attorney's lien — discharge — bankruptcy.

(4) C., the judgment debtor since the date of the docketing of the attorney's lien, has had notice imputed to him of the lien and Murphy's interest thereunder.

Right to lien — bankruptcy — judgment — discharge.

(5) Bankruptcy did not bar the lienor's right to use the judgment to collect his lien, and the trial judge properly refused to discharge that portion of the judgment covered by the lien.

Opinion filed March 27, 1913.

An appeal from the District Court for Grand Forks County; *Templeton,* J.

Affirmed.

W. J. Mayer, for appellant.

An entry in the judgment docket opposite the judgment, of an attorney's lien, is ineffectual to create the statutory lien provided. Rev. Codes 1905, § 6293.

Attorneys' liens are creatures of the statute, and may only be claimed as by statute provided. Rev. Codes 1905, §§ 6293, 6724; 26 Am. & Eng. Enc. Law, p. 671; Deeters v. Clarke, 23 S. D. 298, 121 N. W.

788; Alderman v. Nelson, 111 Ind. 255, 12 N. E. 394; Day v. Bowman, 109 Ind. 383, 10 N. E. 126; Lavender v. Atkins, 20 Neb. 206, 29 N. W. 467; Kreuzen v. 42d Street M. & St. N. Ave. R. Co. 38 N. Y. S. R. 461, 13 N. Y. Supp. 588; Wooding v. Crain, 11 Wash. 207, 39 Pac. 442; Colorado State Bank v. Davidson, 7 Colo. App. 91, 42 Pac. 687; 29 Cyc. p. 1118, and cases cited. Re Scoggin, 5 Sawy. 551, Fed. Cas. No. 12,511.

Statutory liens have no extraterritorial operation. 19 Am. & Eng. Enc. Law, p. 24.

The judgment debt, against which the attorney's lien was sought to be placed, was discharged. Bankruptcy act, § 7, cl. 8; Loveland, Bankr. p. 654.

A lien expires with the destruction of the property to which it attaches. 19 Am. & Eng. Enc. Law, p. 34; Clark v. Sullivan, 3 N. D. 280, 55 N. W. 733, distinguished.

Murphy & Duggan, for respondent.

The proper filing of the attorney's lien against the judgment debt constituted an assignment of the judgment, to the extent of the amount of the lien. Clark v. Sullivan, 3 N. D. 280, 55 N. W. 733.

The holder of an attorney's lien has property in the judgment, the same as though the judgment creditor had assigned the judgment to him as security. It is the attorney's property in equity. Hobson v. Watson, 34 Me. 20, 56 Am. Dec. 632; Newbert v. Cunningham, 50 Me. 231, 79 Am. Dec. 612; Martin v. Hawks, 15 Johns. 405; Wilkins v. Batterman, 4 Barb. 48; Warfield v. Campbell, 38 Ala. 527, 82 Am. Dec. 724; Ely v. Cooke, 28 N. Y. 365; Perry v. Chester, 53 N. Y. 240; Marshall v. Meech, 51 N. Y. 140, 10 Am. Rep. 572; Rooney v. Second Ave. R. Co. 18 N. Y. 368; Hroch v. Aultman & T. Co. 3 S. D. 477, 54 N. W. 269; Brainard v. Elwood, 53 Iowa, 30, 3 N. W. 799; Winslow v. Central Iowa R. Co. 71 Iowa, 197, 32 N. W. 330; Stoddard v. Lord, 36 Or. 412, 59 Pac. 710; Wright v. Wright, 70 N. Y. 98; Pirie v. Harkness, 3 S. D. 178, 52 N. W. 581; McClain's Code, Sec. 4159; 4 Cyc. 1005.

To the extent of his services, an attorney is regarded as an equitable assignee of the judgment. Mosely v. Norman, 74 Ala. 422; Ex parte Lehman, 59 Ala. 631; Terney v. Wilson, 45 N. J. L. 282; Rooney v. Second Ave. R. Co. 18 N. Y. 368; Ex parte Plitt, 2 Wall. Jr. 453,

Fed. Cas. No. 11,228; Leighton v. Serveson, 8 S. D. 350, 66 N. W. 938.

The lien operates as an equitable assignment of so much of the judgment as will satisfy it, and the attorney is subrogated to the rights of his client to that extent. Coombe v. Knox, 28 Mont. 202, 72 Pac. 641; McGregor v. Comstock, 28 N. Y. 237; Fider v. Mannheim, 78 Minn. 309, 81 N. W. 2; Dreiband v. Candler, 166 Mich. 49, 131 N. W. 129; Rev. Codes. 1905, Sec. 6293; 4 Cyc. 1010–1021.

Goss, J. On June 17, 1902, a judgment was entered in this action by Lown, trustee, as plaintiff, against Casselman, defendant. It was the conclusion of considerable litigation. On the day after its entry the attorney of record, C. J. Murphy, filed an attorney's lien for costs advanced and fees due him from the plaintiff for the aggregate sum of $300. This lien was entitled in the action and filed, and the clerk of the district court then made a notation and docket entry upon the judgment docket that an "attorney's lien for $300, claimed by C. J. Murphy, attorney for plaintiff." The judgment debtor, Casselman, was discharged in voluntary bankruptcy on August 1, 1903. In scheduling his debts, the petitioner for bankruptcy listed the judgment and the name of the judgment creditor, Lown, the date and place of entry of the judgment, but made no reference to the attorney's lien filed against the judgment, or of the interest thereunder of C. J. Murphy, the judgment lienor; and the record discloses no notice had by Murphy of the bankruptcy proceedings, nor any participation by him in them. About eight years thereafter, in August, 1911, hearing was had in district court on the motion of Casselman, judgment debtor and bankrupt, to have entered an order discharging the judgment of record. On this hearing C. J. Murphy appeared and resisted the discharge of that portion of the judgment covered by his lien for $300, and interest at 7 per cent per annum from 1902. The trial judge sustained Mr. Murphy's interest to that extent in the judgment, and denied the application to have the entire judgment discharged, but directed the clerk to enter a discharge of that portion of the judgment in excess of said claim of $300, and interest. The trial court treated the attorney's lien as an assignment to the amount thereof of the judgment to the attorney for

the judgment creditor. From this order the judgment debtor, Casselman appeals.

He urges for our consideration five assignments of error. The first error assigned is that "no attorney's lien was ever acquired, because the entry in the docket opposite the judgment was wholly ineffectual to create the statutory lien provided for by § 6293 of the Revised Codes." He contends that this lien is filed under both subdivisions 3 and 4 of § 6293, Rev. Codes 1905, reading: "An attorney has a lien for a general balance of compensation in and for each case upon:

3. "Money due his client in the hands of the adverse party, or attorney of such party, in an action or proceeding in which the attorney claiming the lien was employed from the time of giving notice in writing to such adverse party, or the attorney of such party, if the money is in the possession or under the control of such attorney, which notice shall state the amount claimed and in general terms for what services;" and—

4. "After judgment in any court of record, such notice may be given, and the lien made effective against the judgment debtor by entering the same in the judgment docket opposite the entry of the judgment."

Appellant contends that no actual notice under subdivision 3, above quoted, was given him, and that the lien is invalid. Sufficient answer to this is that the lien was not perfected, nor is it claimed under the provisions of subdivision 3, but instead was an attorney's lien claimed and entered after judgment under a substantial compliance with the provisions of subdivision four. This portion of the statute provides that the entering of the lien in the judgment docket opposite the entry of the judgment shall make the lien effective as against the judgment debtor, and as to him shall constitute sufficient notice. This also disposes of the second and third assignments of error depending thereon.

Under his fourth assignment he urges that "the lien provided for by the Code, even though intended to attach to the debt or chose in action, the right of the judgment creditor to be paid could not attach to a debt the situs of which was extraterritorial." It is immaterial where the parties to the judgment reside, or where may exist the "right of the judgment creditor to be paid," that is, receive payment for the judgment. The judgment is here, and we are dealing with its discharge, a matter entirely separate from the situs of the debt or any law

concerning the place of payment of the debt. The discharge is not a payment, and is governed by the law of the forum controlling the judgment. See Cosgrove v. McAvay, 24 N. D. 343, 139 N. W. 693.

The fifth assignment made is that, "all the points being conceded to the respondent, the lien could not in any event survive the extinction of the judgment resulting from the judgment debtor's discharge in bankruptcy." To be sound, this must assume that the judgment remained the chose in action or claim of the judgment creditor trustee. The judgment was scheduled as the property of the original judgment creditor. Conceding regularity of proceedings leading to the discharge as to any claim under the judgment Lown may have as against the judgment debtor, Casselman, in bankruptcy, no proceedings have been had as against any right or interest Murphy may have in the judgment under his attorney's lien. And here is found the principal contention between the parties. Appellant urges that under the statutory definition of lien, as defined by § 6123, Rev. Codes 1905, providing that "a lien is a charge imposed upon specific property by which it is made security for the performance of an act," considered with § 6133, Rev. Codes 1905, providing "notwithstanding an agreement to the contrary a lien or contract for a lien transfers no title to the property subject to the lien," and § 6135, Rev. Codes 1905, providing "the creation of a lien does not of itself imply that any person is bound to perform the act for which the lien is security," construed together with the principle of law that "a lien expires with the destruction of the property to which it attaches," an attorney's lien under § 6293 cannot operate to pass title or ownership or any equitable interest in and to the judgment itself. That, therefore, the judgment must remain the property of the judgment creditor, subject merely to a charge being imposed against the proceeds thereof should a collection of a judgment be had. And, in the absence of the judgment thus being reduced to a mere money claim, no interest of the attorney attaches; and the judgment being the property and the claim of the judgment creditor until such collection, it was satisfied by the discharge in bankruptcy as a claim in its entirety existing by Lown trustee against the bankrupt or his estate in bankruptcy. Such is the appellant's reasoning, but unfortunately for him it is not supported by the weight of authority. All the principles so involved in arriving at such a conclusion have been, by this court, concluded

against appellant by the case of Clark v. Sullivan, 3 N. D. 280, 55 N. W. 733. There it was held that "the rights of the attorney under his lien are those of an equitable assignee;" and again, "the attorney, being regarded as an equitable assignee of the judgment, has a right to the same remedial processes as his client to obtain satisfaction to the extent of his lien." In Coombe v. Knox, 28 Mont. 202, 72 Pac. 641, speaking of a similar statutory attorneys' lien, that court says: "The lien granted by the statute operates as an equitable assignment of so much of the judgment as will satisfy the lien, and, for the purpose of securing payment, subrogates the attorney to the right of his client to that extent;" following Clark v. Sullivan, supra, and citing Leighton v. Serveson, 8 S. D. 350, 66 N. W. 938, and Stoddard v. Lord, 36 Or. 412, 59 Pac. 710, both of which cases also cite and follow Clark v. Sullivan. See also 4 Cyc. 1005, reading: "The charging lien of an attorney is an equitable right to be paid for his services out of the proceeds of the judgment obtained by his labor and skill. To the extent of such services he is regarded as an equitable assignee of the judgment," citing many cases. And such is the well-settled law. Since the time of filing of this lien in 1902, the attorney has been the equitable assignee and to that extent owner of this judgment to the amount of $300, and interest accruing, and of which, under Clark v. Sullivan, the docket record of the judgment constituted notice. Construing subdivision 4 of § 6293, the court there said: "It only remains to be considered whether the entry of the lien in the judgment docket constituted notice to him [judgment debtor]. When we examine the statute we find that it limits to the judgment debtor the effect of this entry as notice. It says that by this entry the lien is made effective against the judgment debtor. It is apparent that the statute does not mean that any lien is created against the judgment debtor, or against his property, but merely that the entry of the notice constitutes notice to him, so that he cannot thereafter disregard the interest of the attorney in the moneys which he (the debtor) owes the client." So that at all times during the bankruptcy proceedings the bankrupt and his trustee in bankruptcy have had imputed notice of the interest of the attorney in the judgment concerned. No steps were taken to discharge the attorney's interest therein, which interest amounted to a claim against the judgment debtor and the right to use the judgment as the means of

its enforcement. As to Lown bankruptcy had removed the remedy, leaving his claim against the bankrupt unenforceable, and to that extent only has the judgment been discharged. But the portion of the debt and judgment belonging to C. J. Murphy remains intact and unaffected by the bankruptcy proceedings.

Accordingly, the order of the trial court was proper and is in all things affirmed. Respondent will recover costs on this appeal.

MURPHY v. CASSELMAN and The United States Fidelity & Deposit Company, of Baltimore, Maryland.

(141 N. W. 75.)

Judgment — real estate — sale on execution — moot questions.

Held that the decision of this court in Lown v. Casselman, ante, 44, 141 N. W. 73, defendant and appellant, sustaining an attorney's lien against a judgment collected pending this suit, by an execution sale of real estate subsequently redeemed by Casselman, renders moot the questions involved in this appeal; and the claim in litigation having thus been paid, the lower court is directed to enter satisfaction of the judgment appealed from.

Opinion filed March 27, 1913.

An appeal from an order of the District Court for Grand Forks County; *Templeton,* J.

W. J. Mayer, for appellants.

The mere fact of the execution of a bond such as is set forth in this action, without showing acceptance and breach, creates no liability against the obligors. The bond is not in conformity with the Code, in that it imposes conditions not recognized by law. 19 Am. & Eng. Enc. Law, 607–610; 24 Am. & Eng. Enc. Law, 211.

To be valid and enforceable, a bond in such a case must conform to the statute in subject-matter. 4 Am. & Eng. Enc. Law, 667 & 668; 5 Cyc. 747 et seq.; Johnson v. Dun, 75 Minn. 533, 78 N. W. 98; Keith County v. Ogalalla Power & Irrig. Co. 64 Neb. 35, 89 N. W. 375; 20

Enc. Pl. & Pr. 1215; 3 Enc. Pl. & Pr. 30; 1 Enc. Pl. & Pr. 983; Dennis v. Nelson, 55 Minn. 144, 56 N. W. 589; Rev. Codes, 1905, Sec. 6294.

An attorney cannot enjoy his right to a lien without strict compliance with the statute giving the right. Rev. Codes 1905, § 6293; Alderman v. Nelson, 111 Ind. 255, 12 N. E. 394; Day v. Bowman, 109 Ind. 383, 10 N. E. 126; Lavender v. Atkins, 20 Neb. 206, 29 N. W. 467; Kreuzen v. 42d Street M. & St. N. Ave. R. Co. 38 N. Y. S. R. 461, 13 N. Y. Supp. 588; Wooding v. Crain, 11 Wash. 207, 39 Pac. 442; Colorado State Bank v. Davidson, 7 Colo. App. 91, 42 Pac. 687; 26 Am. & Eng. Enc. Law, 671; 36 Cyc. 180, ¶ 6.

The notice of lien required by statute must be signed, unless it is delivered by the person claiming the lien. 29 Cyc. 1118, and cases cited. Colorado State Bank v. Davidson, 7 Colo. App. 91, 42 Pac. 687.

There can be no lien without property upon which it can attach. 19 Am. & Eng. Enc. Law, 24.

A creditor is one who owns a demand provable in bankruptcy. Bankruptcy act, § 1, Subdiv. 9.

A lien is a charge upon specific property as security for the performance of an act. Rev. Codes 1905, § 6133.

A lien, or contract for a lien, transfers no title to the property subject to it. Rev. Codes 1905, § 6133.

A lien expires with the destruction of the property to which it attaches. 19 Am. & Eng. Enc. Law, 34.

Murphy & Duggan, for respondent.

Where a discharge in bankruptcy is legally entered, the indebtedness of the bankrupt is not extinguished; the remedy is lost, but the moral obligation remains. Citizens' Loan Asso. v. Boston & M. R. Co. 196 Mass. 528, 14 L.R.A.(N.S.) 1027, 124 Am. St. Rep. 584, 82 N. E. 696, 13 Ann. Cas. 365; Champion v. Buckingham, 165 Mass. 76, 42 N. E. 498.

The costs incidental to and necessarily incurred in proceedings to enforce an attorney's lien become a part of the lien, and should be allowed. Newbert v. Cunningham, 50 Me. 231, 79 Am. Dec. 612.

Goss, J. Because of matters occurring subsequent to judgment appealed from in this case, as this court understands the record of other proceedings of which it will take judicial notice, the matters now pending on this appeal are wholly moot.

During the pendency of this appeal, and the appeal in the companion case of Lown v. Casselman, ante, 44, 141 N. W. 73, motions were made by the respondents, by attorney C. J. Murphy, the real party in interest under an attorney's lien in the matter before us, to dismiss the appeals in both cases, including this appeal, for the reason that collection had been made by him under execution in the judgment involved in Lown v. Casselman (see 24 N. D. 342, 139 N. W. 804) of the full amount in litigation. This lien claim so-called was the subject-matter also of the present action against Casselman and his bondsmen, who furnished a bond under which the discharge of record of said litigated attorney's lien was made under the provisions of § 6294. So that in lieu of plaintiff Murphy's attorney's lien there was substituted, under the provisions of § 6294, the bond sued upon in this case of Murphy v. Casselman, as principal, and the United States Fidelity and Deposit Company, of Baltimore, Maryland, as surety. Murphy's motion to dismiss was denied. He had procured execution to be issued in the action entitled Lown v. Casselman, and levied upon real estate of Casselman, under which levy sale was had for the full amount of the attorney's lien and accruing costs; but the property so sold was redeemed by Casselman, which redemption was held in Murphy v. Casselman, 24 N. D. 336, 139 N. W. 802, not to constitute a voluntary payment of the judgment, and hence did not render moot the questions submitted for decision in that pending appeal. See also decision on motion in Lown v. Casselman, 24 N. D. 342, 139 N. W. 804. But subsequently Lown v. Casselman was decided by this court on the merits in favor of the respondent, sustaining the order made by the lower court to the effect that the judgment had been unaffected by the bankruptcy proceedings to the extent of $300, and interest, the amount of the attorney's lien claimed of C. J. Murphy, and which, with costs, had been collected under the execution sale of Casselman's real estate, and which amount was received by Murphy upon the redemption so made. This action of Murphy v. Casselman and the bonding company was begun to recover the same lien interest ($300 and interest) for which the execution sale has been had

since rendition of the judgment appealed from. The plaintiff evidently did not desire to rely wholly upon his right to recover in the other action, and so prosecuted this that he might be doubly sure and collect in any event. Under the decision on the merits in Lown v. Casselman, 24 N. D. 342, 139 N. W. 804, in which he was the real party in interest, his contentions have been sustained, and the collection made under the execution against Casselman's property has accordingly been determined to have been a valid collection. This must operate to satisfy the amount for which judgment was ordered in this action, as well as the judgment satisfied by execution in Lown v. Casselman. There is nothing, therefore, before the court to pass upon, except the question of costs in this case. But it is apparent that the claim or debt upon which the judgment in this case is entered should not be collected twice. From the proceedings had it is also our conclusion that neither party should recover costs in district court or on appeal in this action. It may be that plaintiff was justified in putting the claim in judgment, but if so the result thereof was to make it necessary for appellant to appeal in order to prevent the judgment becoming conclusive. We do not believe that plaintiff would collect the judgment twice for the same debt, but took these steps rather as a business precaution. It appearing that the judgment has been paid since entry by the proceedings had as above stated, the judgment appealed from is ordered to be satisfied of record. Neither party will recover costs on this appeal.

IN RE LYNN.

(140 N. W. 710.)

Upon a motion to dismiss accusations in disbarment because the same are verified upon information and belief only, *held:*

Disbarment proceedings — accusation — verification — positive knowledge — in part — sufficient.

(1) Where the verification is in part made upon positive knowledge, it is a sufficient compliance with § 507, Rev. Codes 1905, requiring such an accusation to be "sworn to by the person making it."

Disbarment proceedings — inherent power of court — discretion.

(2) A disbarment accusation presented concerns a matter within the inherent powers of the court; and if the accusation, in the discretion of the court, is deemed sufficient to justify investigation, the proceedings so entertained will not be dismissed where the verification is not made entirely upon positive knowledge of the facts sworn to.

Motion — dismissal — answer — demurrer.

(3) Motion to dismiss is denied, and the accused directed to serve and file his answer or demurrer to the accusations within thirty days.

Opinion filed March 27, 1913.

Goss, J. Written accusations have been filed in this court, asking for the disbarment of an attorney at law. The accusations are in part based upon the records in several cases heretofore before this court on appeal, and in which litigation this attorney was a party or attorney of record. Two of these parties litigant employed counsel, and caused to be prepared and presented a lengthy written accusation, subscribed by them but verified by one of their attorneys. After careful consideration of the charges made, and in the exercise of its discretion in the matter, this court decided to entertain the disbarment proceeding, and directed the filing of the accusations and the service of a copy thereof upon the accused. Service was made. The accused then filed a written motion, asking the dismissal of the accusations, and that the same be stricken from the files of this court, upon the grounds "that the accusations are not sworn to by the parties making the accusations, as required by § 507 of the Revised Codes of 1905; and that the attorney who swears to the accusations on information and belief affirmatively discloses that his information is derived from hearsay, secondary and inadmissible evidence in this proceeding, and not upon information of the probative facts as to the matters and things alleged in said accusations." Hearing was had upon this motion, and this court renders its decision thereon in the following opinion:

Sec. 507, referred to, reads: "The proceeding to remove or suspend an attorney may be commenced by direction of the court or on motion of any individual. In the former case the court must direct some attorney to draw up the accusation; in the latter the accusation must be drawn up and sworn to by the person making it." It is

urged that this statute requires a verification on positive knowledge, and that it be made by the accusers; and that the verification of a disclosed attorney of the accusers is not a compliance with the statutory requirement. If the statute is to be given a strict interpretation to the effect contended for, that it must be sworn to by the accuser and that the verification of an attorney employed for and in behalf of and as the agent of the accuser will be insufficient, then we must likewise hold that an accusation drawn up by any other person than the accuser will not satisfy the statute declaring that "the accusation must be drawn up and sworn to by the person making it." To so hold would be to convict the legislature enacting this statute of almost imbecility. The section provides that where the proceedings are instituted on the court's own motion it may direct "some attorney to draw up the accusation," but where disbarment is asked by a private individual "the accusation must be drawn up and sworn to by the person making it." No good reason exists why an attorney should not prepare an accusation in either case, and, if cognizant of the facts, make the verification required. Besides, the authorities are in unison in holding that in enacting these statutes governing procedure in disbarment proceedings, the legislature is not granting any rights to courts, but instead, such legislation is upon matters and concerning powers always considered as inherent in courts of general jurisdiction. The power to disbar an attorney is a right inherent in this court. As was said by this court in Re Eaton, 7 N. D. 269, on page 273, 274, 74 N. W. 870, a proceeding to disbar is a special proceeding. "It is special in that it is neither a civil action nor a criminal action, but is on the contrary a remedy in court which is readily distinguishable from both, not only with respect to the objects sought in actions, but as well with respect to the procedure which governs in actions. . . . We are inclined to hold . . . that it was not the legislative purpose, in making the general classification of remedies in court, to settle all details of practice and procedure in such purely statutory proceedings," such as disbarment proceedings. The statute must not be taken as limiting the power of the court, but rather as declaring a rule for guidance in the exercise by it of discretion in the entertainment or rejection of charges preferred to secure disbarment. Such has been its interpretation under similar statutes. See Re Burnette, 70 Kan. 229, 78 Pac. 440, where statutory provisions iden-

tical in language with our own are passed upon under a similar issue, where an accusation was claimed to be void because sworn to upon information and belief. And § 399 of the Kansas General Statutes of 1901 is identical with our § 507 under consideration, containing the provision, "In the latter the accusation must be drawn up and sworn to by the person making it" (where made by a third party). The court's interpretation is upon a statute identical with ours and in the following language: "Under the provisions of this section the court may, on its own motion, direct a lawyer to draw up the accusation, and such accusation need not be verified. This section also provides that an investigation into the conduct of an attorney may be instituted on the motion of any person interested, but such accusation must be sworn to by the person making it. These provisions are only preliminary and are intended to arrest the attention of the court. . . . If the court deems the accusation sufficient to justify further action, it shall then take such steps as are pointed out in this section. The sufficiency and formality of the accusation are examined and passed upon by the court before an order is made. The verification is not jurisdictional, and an entire absence of any verification would not render a judgment based on a proceeding otherwise regular void or voidable." That court also says: "A proceeding to disbar an attorney is *sui generis*. The statutory rule of evidence provided . . . has no application." We are satisfied that an accusation may be drawn up by an attorney, which proposition is conceded; also that it may be verified by an attorney when instituted by a private party.

It is contended that if the accusation can be verified by an attorney, it must be upon positive knowledge, and not upon information and belief, to comply with the statute. In support of this is cited Re Hotchkiss, 58 Cal. 39; People ex rel. Wright v. Lamborn, 2 Ill. 125; Re McCraney, 102 Cal. 467, 36 Pac. 812; Re Sayre, — Cal. —, 36 Pac. 813; and Re Weed, 26 Mont. 241, 67 Pac. 308.

This objection fails when we find the verification is not made wholly upon information and belief. As a part of said verification, nearly two typewritten pages of alleged facts are positively stated upon which such belief is said to be founded, and therein calling attention to the files of this court and its opinions in two cases found in vol. 122 N. W. Reporter; reciting also as evidence certain files of the district court

of Emmons county in four other named actions, together with facts positively averred concerning such court records, consisting of exhibits, letters, stipulations, contracts, and other documents in evidence, including certified transcripts of testimony and depositions. It avers "that affiant has, to the best of his ability, set forth in the foregoing petition the facts as they appear to be and as disclosed by the records referred to, and as a result of a careful examination thereof made by affiant personally; and affiant believes the facts to be as in said petition set forth. . . . And affiant further believes that the charges in said petition are preferred in good faith by said petitioners from good and justifiable motives, . . . and that he is one of the attorneys for the petitioners named in the foregoing petition, and has been retained by said petitioners to prepare and present in their name the foregoing petition to this court; that the facts alleged in the foregoing petition are true, to the best of affiant's knowledge, information, and belief; that affiant's knowledge and information as to the truth of the allegations in the petition have been derived from" certain sources named. This is far from being a verification upon information and belief only. Instead it is a rehearsal on positive knowledge of facts in support of the accusations, and stating the information and grounds of belief upon which the charges are made. Indeed, it complies strictly with the California rule invoked by this moving party, as construed in Re McCraney, 102 Cal. 467, 36 Pac. 812, from which we quote: "It was held in Re Hotchkiss, 58 Cal. 39, that by these provisions the legislature clearly intended that the accusations must be made by one who has at least some information on which he bases his charges, and that an accusation merely upon information that was not supported by the affidavit of the informant was insufficient." Such is the California rule under statutes similar to ours. When the Hotchkiss Case is examined, we do not wonder at the holding, as the verification is by a third party upon information and belief only, and without disclosing why he verifies or that he is an attorney for the accusers. That case is merely authority to the effect that disbarment charges cannot be considered when made by one party and verified wholly on information and belief by a different party. Montana, under similar statutes, has held that where an accusation contains matter in part stated on information and belief, and in part charged positively and verified as true, "except in

those instances where the allegations are made upon the best information and belief of affiant, and as to such allegations thus made he believes them to be true," is sufficient "inasmuch as portions of the accusation consist of allegations positively made." Re Wellcome, 23 Mont. 213, 58 Pac. 47, on page 53, with the companion case of the same name, 23 Mont. 140, 58 Pac. 45, also well illustrate the proposition as announced in the Kansas case, Re Burnette, 70 Kan. 229, 78 Pac. 440, that the matter of verification is one for the court to consider when determining whether its discretion will be exercised in favor of an investigation of the charges contained in accusations of disbarment, and as not going to the jurisdiction of the court to entertain the disbarment matter; and such we believe to be the sound rule. The verification to the accusation is a substantial compliance with § 507, Rev. Codes 1905, and the motion to dismiss and strike the accusations from the files of the court is denied.

The moving party is directed to serve his answer or demurrer to said accusations upon the attorney for the accusers, and file the same so served with the clerk of this court within thirty days from the date of notice of filing of this opinion and order.

STATE v. SUND.

(140 N. W. 716.)

Appeal — record — transmission — notice — brief and abstract — filing — time — merits.

1. Appellant failed to transmit the record on this appeal to this court. Notice was served on him, requiring him to do so within twenty days. He failed to have the record transmitted or abstract or brief filed or served; whereupon a motion was made to dismiss the appeal. This court granted the motion unless defendant filed the record here, and filed and served abstract and brief not later than March 1, 1913. Subsequent to March 1st another application was made for an extension of time in which to do these things, and denied. Defendant is again before this court, asking an extension of time for the purposes stated. On a brief review of the circumstances stated in the opinion, it is *held*, that defendant is not in position to ask favors from this court, particularly

in view of the fact that on the former applications the one point on which he relied for a reversal was considered and found to be without merit.

Remittitur — filed — review — jurisdiction.

2. When a remittitur has gone down from this court, and has been filed in the trial court, under all ordinary circumstances this court has lost jurisdiction of the case, and cannot review its decision.

Opinion filed March 29, 1913.

Application for an order granting further time in which to file the record and serve and file abstract and brief.

Denied.

George M. Price, Langdon, for motion.

G. Grimson, State's Attorney, Langdon, and *Alfred Zuger,* Assistant Attorney General, *contra.*

SPALDING, Ch. J. The defendant was convicted of the crime of embezzlement, in the district court of Cavalier county, about the middle of July, 1912, and about the 22d day of July, 1912, perfected an appeal to this court from the judgment. On December 3, 1912, the state served notice upon counsel for appellant, notifying and requiring him to file with the clerk of this court the record on appeal in this action within twenty days after the date of said service, and that in case of his failure so to do the state would apply to the supreme court for an order dismissing such appeal for failure to file the return as required by law, and for want of prosecution. Appellant failing to file the return, the state duly submitted a motion, on the 3d day of February, 1913, for an order of this court dismissing such appeal and affirming the judgment of the district court sentencing said defendant. On said 3d day of February, 1913, the defendant appeared by counsel and opposed the granting of the state's motion, setting forth by affidavit various matters claimed to excuse his failure to transmit the record and prosecute his appeal.

On due consideration this court, on the same day, entered an order dismissing the appeal unless the defendant should cause the record thereon, together with abstract and brief, to be filed in this court and served on counsel for the state not later than March 1, 1913; and providing that, on such filing and service, the cause should stand for argument at

the April, 1913, term. The defendant failed to take advantage of the extension thus given him, by complying with the terms of the order, and on the 5th day of March, 1913, he submitted a motion for a further extension of time in which to transmit the record, and file and serve abstracts and brief. This motion was, on the same day, denied, and the remittitur was transmitted on the 10th of March, 1913. Appellant again appeared before this court, on the 21st day of March, 1913, and renewed the motion of March 5th for a further extension of time for the purpose above stated. Counsel for the state and the attorney general's office appeared in opposition thereto.

The court has carefully considered the extensive showing made by appellant. It would unduly extend this opinion to recite even the substance of such showing. We only need say that it discloses the fact that the defendant departed from this state and took up his residence in Minnesota, without informing his counsel of that fact, and that he appears to have taken no precautions to keep advised regarding the progress of his litigation, and did not instruct his counsel where to reach him in case of need; and that, at least in part, the failure to prosecute the appeal has been occasioned by his counsel being unable to reach him promptly. The grounds alleged also include the engagement of his counsel on other imperative duties and serious illness of counsel, as well as the failure of the stenographer of the district court to speedily transcribe the record. Counsel takes upon himself much of the responsibility for the delay; but, after carefully examining the showing made by both sides, we are satisfied that counsel served his client diligently and faithfully, and that the defendant himself is the one responsible for the failure to transmit the record in accordance with the original order of this court. Had he kept his counsel advised of his whereabouts, and had he not departed from the state, he would have been in position, on the first and second applications, to have asked for leniency.

All these things were considered on the former applications. The basis for the appeal was also considered. We were advised by counsel for appellant that he relied for a reversal on the form of an allegation or recital of the information. The imperfection, if it existed, was largely technical in its character. We then examined authorities on the subject, and became satisfied that there was no merit in the assignment

of error on which appellant relied, and this fact had much influence upon our decision last made.

There, however, on this application, arises another question which did not exist on the submission of the former applications. The remittitur was transmitted by the clerk of this court on the 10th day of March, 1913, and in due course must have reached the trial court long before this application was submitted, and if so this court is no longer possessed of jurisdiction over the case, and has no lawful power to review its prior orders in the absence of fraud in securing the transmission of the remittitur, or mistake, or inadvertence in transmitting it. There must be an end to litigating a question, at some point of time, and if this court was at liberty to review and re-review and review again its decisions in the same cause in which they were made, our time could be fully occupied in the reconsideration of questions supposed to have been long since settled, without taking up new litigation. This question has been passed upon by other courts. We call attention to a few of the authorities. Leese v. Clark, 20 Cal. 388, in which, in an opinion written by Chief Justice Field, this question was discussed at length, and it was held that the court cannot recall a case and reverse its decision after the remittitur is issued; that it has determined the principles of law which shall govern, and having thus determined, its jurisdiction in that respect is gone. And the court said: "The supreme court has no appellate jurisdiction over its own judgments; it cannot review or modify them after the case has once passed, by the issuance of the remittitur, from its control." "The court cannot recall the case and reverse its decision after the remittitur is issued."

To the same effect see: Blanc v. Bowman, 22 Cal. 24; Herrlick v. McDonald, 83 Cal. 506, 23 Pac. 710; Richardson v. Chicago Packing & Provision Co. 135 Cal. 311, 67 Pac. 769; Frazer v. Western, 3 How. Pr. 235; Latson v. Wallace, 9 How. Pr. 334; Legg v. Overbagh, 4 Wend. 189; Delaplaine v. Bergen, 7 Hill, 591; Martin v. Wilson, 1 N. Y. 240; Dresser v. Brooks, 2 N. Y. 560. Some of the above authorities fix the time when this court loses jurisdiction at the time when the remittitur is issued, and others at the date of filing in the trial court.

As to exceptions to this rule consult: Nystrom v. Templeton, 17 N. D. 463, 117 N. W. 473; Hanson v. McCue, 43 Cal. 178; Trumpler v. Trumpler, 123 Cal. 248, 55 Pac. 1008.

We hold that when a remittitur has gone down, and has been filed in the trial court, this court, except under extraordinary circumstances, has lost jurisdiction of the case, and cannot review its decision.

The application is denied.

THE W. T. RAWLEIGH MEDICAL COMPANY, a Corporation, v. LAURSEN et al.

(141 N. W. 64.)

Appeal bond — justification — sureties — amendment — new bond — application.

1. A justification upon an appeal bond, which fails to state that the sureties are worth "the sums therein mentioned, over and above their debts and liabilities not by law exempt from execution, in *property within the state of North Dakota*," is defective. The appellant, however, may, upon a proper showing, and under § 7224, Rev. Codes 1905, be allowed to either amend the undertaking or to file a new bond in the supreme court.

Dismissal of appeal — abstract — evidence — exhibits.

2. It is not in itself a sufficient ground for the dismissal of an appeal that an appellant has failed to include in his abstract all of the evidence and exhibits necessary to a proper consideration of the case.

Appeal — dismissal — motion — abstract — failure to file terms of court — excuse.

3. Under § 7231, Rev. Codes 1905, which provides that "unless continued for cause, all civil cases appealed to the supreme court shall be heard at the next succeeding term of the court . . ." "when the appeal is taken sixty days before the first day of the term," and when appellant fails to serve and file his abstract in time for the next term, but no motion to dismiss the appeal on that ground is made at such term, the court may, upon a proper showing, at such subsequent term, excuse such failure.

Note.—The above case seems to be in harmony with the general rule, as shown by a note on the question of the necessity of notice of acceptance to bind guarantor, in 16 L.R.A.(N.S.) 353, 379, that notice of acceptance may be waived by the guarantor, either by an acknowledgment of liability or other conduct, by the terms of the offer itself, or by express stipulation. See also supplemental note in 33 L.R.A. (N.S.) 960, and notes on this subject in 105 Am. St. Rep. 515; 39 Am. Rep. 221; and 29 L. ed. U. S. 480.

Statute — motion — appeal.

4. Such statute is not self-operating, and no motion having been made to dismiss the appeal at the first term, and since, if such motion had been made, the court might have granted a continuance or for other reasons denied the motion, the matter would come up at the second term as a new question to be presented at such term.

Contract — guaranty — performance — proof — acceptance — signature.

5. Where defendants had guaranteed the faithful performance of a certain contract, and where sued for the breach thereof, on such guaranty, it was not necessary to prove the signature of the plaintiff to the original contract, it being shown that he had accepted the same and had shipped goods thereunder, and the signatures of the other party and of the guarantors being proven.

Guarantor — notice of acceptance — waiver — intention — vendor — proof.

6. The right of a guarantor at the common-law and under § 6080, Rev. Codes 1905, to notice that his proposal of guaranty is accepted and will be acted upon, may be waived by the form of the guaranty or by the manifest intention of the parties, as implied thereby. Where, therefore, a guaranty read, "In consideration of the W. T. Rawleigh Medical Company extending credit to the above-named person, we hereby guarantee to it, jointly and severally, the honest and faithful performance of the said contract by him, *waiving acceptance and all notice*, and agree that any extension of time or change of territory shall not release us from liability hereon," and it appeared from the evidence that the said guaranty was attached to the contract, and was taken by the principal to the guarantors and signed by them, and then was sent by the said principal to the vendor or guarantee, and that the said vendor wrote to the principal accepting the same, and furnished goods thereunder, *held*, that it was not necessary to prove an acceptance of the guaranty by the seller or guarantee personally made or written to the guarantors.

Opinion filed March 29, 1913.

Appeal from the District Court for Barnes County; *Templeton*, Special Judge.

Action against principal and guarantors upon a contract of sale, for the breach of the same. Judgment for plaintiff. Defendants (guarantors) appeal.

Affirmed.

On or about May 10, 1908, a contract was entered into between the W. T. Rawleigh Medical Company and one Lauritz Laursen, under

and by the terms of which the said medical company agreed to sell to the said Laursen certain merchandise, and the said Laursen agreed to pay for the same according to a schedule of prices and in a manner in said contract stated. Before the delivery of the goods, the medical company required that a guaranty be furnished for the faithful performance of the contract on the part of the said Laursen, and this contract was sent to Laursen by the company for both his signature and that of the guarantors. The contract was then signed by Laursen, and he took the same to the guarantors and obtained their signatures to the guaranty printed thereon. He then mailed the contract to the medical company. On May 20th, the company wrote Laursen, accepting the said contract and approving of the said sureties. Subsequently the medical company forwarded the goods under the contract to Laursen. Payment was not made, and an action was brought against Laursen and the guarantors, Lee and Blank, to recover the agreed price. At the conclusion of the trial the court directed a verdict in favor of the plaintiff, and from the judgment entered thereon the defendants Lee and Blank appealed.

Page & Englert, for appellants.

The contract involved was denied in the answer, and there it was necessary for plaintiff to establish the same by at least proving its proper execution. The genuineness of the signatures should be proved. Pullen v. Hutchinson, 25 Me. 249; Brayley v. Kelly, 25 Minn. 160; Curtis v. Hall, 4 N. J. L. 148; Seibold v. Rogers, 110 Ala. 438, 18 So. 312; Rutherford v. Dyer, 146 Ala. 665, 40 So. 974.

If there was no properly executed contract at the time the guaranty was signed, or, if it was not properly received in evidence, there was no basis for the action. Barnes Cycle Co. v. Reed, 84 Fed. 603, 33 C. C. A. 646, 63 U. S. App. 279, 91 Fed. 481; Coe v. Buehler, 110 Pa. 366, 5 Atl. 20; Evans v. McCormick, 167 Pa. 247, 31 Atl. 563.

There was no notice of acceptance of the guaranty on the part of plaintiff, to the guarantors. Standard Sewing Mach. Co. v. Church, 11 N. D. 420, 92 N. W. 805; William Deering & Co. v. Mortell, 21 S. D. 159, 16 L.R.A.(N.S.) 352, 110 N. W. 86.

A party giving a letter of guaranty has the right to know whether it is accepted, and whether the person to whom it is addressed means to act upon it, or give credit on the strength of it. Douglass v. Reynolds, 7 Pet. 113, 8 L. ed. 626.

The so-called guaranty was a mere offer, never accepted—and was, in any event, without consideration. Standard Sewing Mach. Co. v. Church and William Deering & Co. v. Mortell, supra; Davis Sewing Mach. Co. v. Richards, 115 U. S. 524, 29 L. ed. 480, 6 Sup. Ct. Rep. 173; Hoffman v. Mayaud, 35 C. C. A. 256, 93 Fed. 171; Fellows v. Prentiss, 3 Denio, 512, 45 Am. Dec. 484; Winnebago Paper Mills v. Travis, 56 Minn. 480, 58 N. W. 36.

The fact that plaintiff furnished goods to the principal debtor, under the contract, and in reliance upon the offer of guaranty, would not dispense with notice of acceptance, and of plaintiff's intuition to act upon the guaranty. Walker v. Forbes, 25 Ala. 139, 60 Am. Dec. 498; Rapelye v. Bailey, 3 Conn. 438, 8 Am. Dec. 199; Wills v. Ross, 77 Ind. 1, 40 Am. Rep. 279; Milroy v. Quinn, 69 Ind. 406, 35 Am. Rep. 227; Mussey v. Rayner, 22 Pick. 223; Winnebago Paper Mills v. Travis, 56 Minn. 480, 58 N. W. 36; Standard Sewing Mach. Co. v. Church, 11 N. D. 420, 92 N. W. 805; William Deering & Co. v. Mortell, 21 S. D. 159, 16 L.R.A.(N.S.) 352, 110 N. W. 86; Davis Sewing Mach. Co. v. Richards, 115 U. S. 524, 29 L. ed. 480, 6 Sup. Ct. Rep. 173; Tuckerman v. French, 7 Me. 115; Oaks v. Weller, 13 Vt. 106, 37 Am. Dec. 583; Steadman v. Guthrie, 4 Met. (Ky.) 147; Douglass v. Reynolds, 7 Pet. 113, 8 L. ed. 626.

Herman Winterer and *David S. Ritchie,* for respondent.

The engagement or contract of guaranty may be written on the back of the note or bill, or on a separate paper. If accepted and acted upon, it is sufficient. 20 Cyc. 1400, 1401; Mallory v. Grant, 4 Chand. (Wis.) 143, 3 Pinney (Wis.) 443; Forman v. Stebbins, 4 Hill, 181; Peck v. Barney, 12 Vt. 72; Feustmann v. Gott, 65 Mich. 592, 32 N. W. 869; Burns v. Cole, 117 Iowa, 262, 90 N. W. 731.

The appellants having guaranteed the performance of the main contract, they are estopped to deny the due execution of the contract. Otto v. Jackson, 35 Ill. 349; Mason v. Nichols, 22 Wis. 376.

Even though a contract is not signed by the principal, yet if he accepts and enjoys the benefits of it, his guarantor will be bound. McLaughlin v. McGovern, 34 Barb. 208; Clark v. Gordon, 121 Mass. 330; McConnon & Co. v. Laursen, 22 N. D. 604, 135 N. W. 213; Emerson Mfg. Co. v. Tvedt, 19 N. D. 8, 120 N. W. 1094; Swisher v. Deering, 204 Ill. 203, 68 N. E. 517; Taussig v. Reid, 145 Ill. 488, 36 Am. St.

Rep. 504, 30 N. E. 1032, 32 N. E. 918; Hughes v. Roberts, J. & R. Shoe Co. 24 Ky. L. Rep. 2003, 72 S. W. 799; Davis Sewing Mach. Co. v. Rosenbaum, — Miss. —, 16 So. 340; People's Bank v. Lemarie, 106 La. 429, 31 So. 138, 141; Bank of California v. Union Packing Co. 60 Wash. 456, 111 Pac. 573; 14 Am. & Eng. Enc. Law, 1149; Trefethen v. Locke, 16 La. Ann. 19; Wadsworth v. Allen, 8 Gratt. 174, 56 Am. Dec. 137; Farwell v. Sully, 38 Iowa, 387; Bickford v. Gibbs, 8 Cush. 154; Worchester County Inst. for Sav. v. Davis, 13 Gray, 531; Reynolds v. Douglass, 12 Pet. 497, 9 L. ed. 1171; Kennedy & S. Lumber Co. v. S. S. Constr. Co. 123 Cal. 584, 56 Pac. 457; Garland v. Gaines, 73 Conn. 662, 84 Am. St. Rep. 182, 49 Atl. 19; Bond v. John V. Farwell Co. 96 C. C. A. 546, 172 Fed. 58; Cumberland Glass Mfg. Co. v. Wheaton, 208 Mass. 425, 94 N. E. 803; Graham v. Middleby, 185 Mass. 355, 70 N. E. 416; New Haven County Bank v. Mitchell, 15 Conn. 206; Noyes v. Nichols, 28 Vt. 159; Nading v. McGregor, 121 Ind. 465, 6 L.R.A. 686, 23 N. E. 283.

The delivery and acceptance of the contract, the sale of the goods, and extension or credit in reliance upon the guaranty attached, were consummated as the parties intended, by one connected transaction. Cumberland Glass Mfg. Co. v. Wheaton, 208 Mass. 425, 94 N. E. 803; Sheppard v. Daniel Miller Co. 7 Ga. App. 760, 68 S. E. 451; Bank of California v. Union Packing Co. 60 Wash. 456, 111 Pac. 573; J. R. Watkins Medical Co. v. Brand, 143 Ky. 468, 33 L.R.A.(N.S.) 960, 136 S. W. 867; Stewart v. Knight & J. Co. 166 Ind. 498, 76 N. E. 743; Closson v. Billman, 161 Ind. 610, 69 N. E. 449; Bankers Iowa State Bank v. Mason Hand Lathe Co. 121 Iowa, 570, 90 N. W. 612, 97 N. W. 70; Frost v. Standard Metal Co. 215 Ill. 240, 74 N. E. 139; Lennox v. Murphy, 171 Mass. 370, 50 N. E. 644.

BRUCE, J. (after stating the facts as above). A motion is made to dismiss the appeal, for the reason that the appellants have failed to perfect the same by serving and filing a sufficient undertaking within one year from the date of notice of entry of judgment. There is no doubt in our minds that the undertaking is defective. The justification, indeed, fails entirely to state that the sureties are worth "the sum therein mentioned, over and above their debts and liabilities not by

law exempt from execution, *in property within the state of North Dakota.*" This allegation seems to be necessary. See § 7221, Rev. Codes 1905; Stewart v. Lyness, 22 N. D. 149, 132 N. W. 768; Burger v. Sinclair, 24 N. D. 326, 140 N. W. 235. Appellant, however, has asked this court for leave to either amend the undertaking on appeal so as to remedy the defect, or to be allowed to file a new undertaking. This permission, where the court has reasonable grounds to believe that the appeal has been taken in good faith, may be granted, even though the time for appealing has expired. § 7224, Rev. Codes 1905; Burger v. Sinclair, 24 N. D. 326, 140 N. W. 235.

Respondent also moves for a dismissal of the appeal, for the reason that appellant has violated rule 16 of this court by failing to include in his abstract all of the evidence, exhibits, etc., necessary to a proper consideration of the case, as the same appear in the settled statement of the case. He is, however, in error in regard to the rule. Rule 16 applies merely to trials *de novo,* of which this is not one. Rule 12, it is true, requires all material parts of the record to be embodied in the abstract, but rule 13 gives to the respondent the opportunity to prepare an amended abstract if he deems the abstract of the appellant insufficient. We do not believe that any material exhibits were omitted. Even if they were, the omission would hardly be ground for the dismissal of the appeal.

Respondent also urges that the appellant has failed to file abstract and briefs within the time required by statute, and that therefore the appeal should be dismissed. The notice of appeal and undertaking on appeal were served upon the respondent in the latter part of August, 1911, and were filed in the office of the clerk of the district court on the 6th day of January, 1912. Respondent contends that, the record showing that the appeal was perfected more than sixty days prior to the April term of this court, it was necessary, under the statute, that the cause "should be heard at said term, unless, for good cause shown, it was continued," and that since no steps were taken in the matter, or abstract or briefs filed until the month of August, 1912, the appeal must be deemed to have been abandoned. He cites § 7231, Rev. Codes 1905, which provides that, "unless continued for cause, all civil cases appealed to the supreme court shall be heard at the next succeeding term of court in either of the cases following: (1) When the appeal is taken sixty

days before the first day of the term; (2) when, by either party, a printed abstract and a printed brief are served twenty-five days before the first day of the term."

Appellants, on the other hand, seek to excuse their delay by showing that the transcript was not obtained until May 15, 1911; that the statement of the case was settled June 22, 1911; that the notice of appeal and undertaking were served on the 22d day of July, 1911, and filed on the 6th day of January, 1912; that during February they sent the abstract to the printer, but that the printer delayed and failed to get out the same in time for the April term of the court, though he did so in ample time for the October term, and that the abstracts were filed and served in ample time for the October term. Plaintiff and respondent insists, nevertheless, that the appeal should be dismissed, and that § 7231 of the statute is mandatory. Counsel cites the South Dakota cases of Todd v. Carr, 17 S. D. 514, 97 N. W. 720; Russell v. Deadwood Development Co. 16 S. D. 644, 94 N. W. 693; Bunday v. Smith, 23 S. D. 308, 121 N. W. 792; Whitcher v. Foote, 30 S. D. 39, 128 N. W. 1022; Neilson v. Chicago & N. W. R. Co. 27 S. D. 96, 129 N. W. 907. None of these cases, however, bear out his proposition in its entirety. In all of them the court exercised its discretion, or the motion for dismissal was made at the proper time. The statute, we believe, is not self-executing. All that it and the rules provide is that at the next succeeding term of court the cases shall be heard, and, unless the briefs and abstracts are filed, shall be dismissed *unless good ground is shown for their continuance and they are continued by the court.* Plaintiff and respondent made no motion for a dismissal at the April term. If he had done so, this court, in its discretion, could have dismissed the appeal, or, on a proper showing, have continued the case until the October term. We hold, in short, that the statute is not self-executing, and since, under the showing in this case, the delay seems to have been excusable, we will now when the point is first raised deny the motion to dismiss the appeal.

Defendants and appellants assign as error the action of the court in admitting in evidence the original contract between the Rawleigh Medical Company and the defendant Laursen, for the performance of which the appellants are sought to be held as guarantors. On the trial the execution by the defendant Laursen and by the appellants was

proved, but there was no identification of the signature of the Rawleigh Medical Company, and the failure to make this specific proof is claimed to be fatal to the action. We do not, however, so consider it. There is no doubt of the execution by appellants, and there is no question of the acceptance of the contract by the plaintiff. There is no doubt that the goods were delivered under the contract, and there is abundant proof of its acceptance, even though not of the actual signature of the medical company. G. F. Korf, for instance, testifies: "I am manager of the W. T. Rawleigh Medical Company. . . . Subsequently, I received an application for contract from Mr. Laursen. In response thereto I sent him a blank contract. He thereafter returned the contract, with letter dated May 11, 1908, marked Exhibit C and made a part of the deposition. I acknowledged this letter on May 14, 1908, marked Exhibit D, and attached to the deposition. Exhibit E is Mr. Laursen's contract for the sale of the W. T. Rawleigh Medical Company's products. This is the contract mentioned in the letter as being sent by Mr. Laursen. Exhibit E is attached to the deposition. The signatures of C. J. Lee and Sam Blank appear on this contract as guarantors. We made acceptance of this contract on May 20, 1908, by sending a letter to that effect to Mr. Laursen. Exhibit F is copy of letter offered in evidence and attached to deposition. Subsequent to the acceptance of the contract Mr. Laursen forwarded an order for goods, and we shipped it." In Exhibit F, referred to, the plaintiff specifically accepted the contract. This being the state of the facts, the actual signature of the plaintiff upon the contract was not necessary.

So, too, it is to be borne in mind that appellants are sued not upon the original contract, but upon the guaranty thereto attached, and the original contract is only important in so far as it furnishes a measure of liability. The contract of guaranty provides: "In consideration of the W. T. Rawleigh Medical Company extending credit to the abovenamed person, we hereby guarantee to it, jointly and severally, the honest and faithful performance of the said contract by him, waiving acceptance and all notice, and agree that any extension of time or change of territory shall not release us from liability hereon. (Signed) C. J. Lee, Sam Blank." The guaranty was merely an offer that if the Rawleigh Medical Company would accept the contract above mentioned, the

guarantors would be responsible therefor; and of that acceptance there is, as we have said, no question in the evidence.

But appellants also insist that the guaranty was merely an offer of guaranty, and that, there being no proof in the record of an acceptance of the same directly communicated by the plaintiffs to the guarantors, no liability can be had thereunder. There is no merit in this contention. In their written offer, if offer it be, the guarantors expressly waived "acceptance and all notice," and we see no reason why parties may not contract as they please, as long as the contracts which they make are not against public policy. At any rate, we have yet to find a case where a waiver of such notice of acceptance has been held to be a nullity. On the other hand, the validity of such agreements has been constantly upheld. 14 Am. & Eng. Enc. Law, 1149; Brandt, Suretyship, § 225; Hughes v. Roberts, J. & R. Shoe Co. 24 Ky. L. Rep. 2003, 72 S. W. 799; Davis Sewing Mach. Co. v. Rosenbaum, — Miss. —, 16 So. 340; People's Bank v. Lemarie, 106 La. 429, 31 So. 138, 141; Bank of California v. Union Packing Co. 60 Wash. 456, 111 Pac. 573; Wadsworth v. Allen, 8 Gratt. 174, 56 Am. Dec. 137; Bickford v. Gibbs, 8 Cush. 154; Story, Contr. 5th ed. § 1133; Swisher v. Deering, 104 Ill. App. 572, affirmed in 204 Ill. 203, 68 N. E. 517. We realize that counsel for appellant seeks to distinguish some of these cases by alleging that in them not only was the notice of acceptance waived, but there was an express consideration of $1 or more for the guaranty. It is true that such expressed consideration existed in some of the cases cited, but in none of them was it made the foundation of the holding or decision. The fact of the consideration, indeed, was absolutely ignored in all of them, and the holdings were based upon the proposition that the guarantor was "*sui juris,* and that no legal reason can be given why he could not agree to dispense with the notice of acceptance." See Hughes v. Roberts, J. & R. Shoe Co. 24 Ky. L. Rep. 2003, 72 S. W. 799, 800.

We also are aware of the decisions in Standard Sewing Mach. Co. v. Church, 11 N. D. 420, 92 N. W. 805; William Deering & Co. v. Mortelle, 21 S. D. 159, 16 L.R.A.(N.S.) 352, 110 N. W. 86; and Emerson Mfg. Co. v. Tvedt, 19 N. D. 8, 120 N. W. 1094, cited by counsel for appellant. In the two prior cases, however, there was no waiver of acceptance and notice, while the third case is an authority

for our holding in the case at bar. We know that counsel for appellant seeks to argue from it that, in order that notice of acceptance may be waived, there must by a consideration expressed in the guaranty, and upon which the guaranty may stand independently. We do not, however, so understand the case. What it did hold was that where there was a consideration the instrument would be deemed to be a guaranty, and not merely an offer to guarantee, and the case in no way negatives the proposition that an offer to guarantee might be made which would itself waive an actual notice of acceptance to the offerer, and provide that delivery of the goods on the original contract would be all that would be required. We also know that it is argued that there was no consideration shown for this promise or guaranty, and no meeting of the minds. Such, however, is not the case. There may have been no consideration at the time that the signatures of C. J. Lee and Sam Blank were attached thereto; but directly the plaintiff accepted the same and began to ship goods thereunder, a consideration sprang into existence. Then, also, the minds met. Bickford v. Gibbs, 8 Cush. 154; Platter v. Green, 26 Kan. 252; Kennedy & S. Lumber Co. v. S. S. Contr. Co. 123 Cal. 584, 56 Pac. 457; Dan. Neg. Inst. § 1759. If appellant's contention, indeed, is correct, then there is never any consideration or meeting of the minds in a contract which is based upon an offer and an acceptance.

The case, indeed, is almost parallel in principle with that of Garland v. Gaines, 73 Conn. 662, 34 Am. St. Rep. 182, 49 Atl. 19, and which case is undoubtedly supported by the authorities. In it a householder, being unwilling to rent some rooms to a college student without the guaranty of his father, signed a lease in duplicate, and sent the same to the boy, to be executed by him, and to have the guaranty at the foot thereof signed by his father, they both being out of the state. The lease was signed and returned to the plaintiff, and the boy took possession of the rooms thereafter. He went away without paying the rent, and the father was sued. "It is true there must have been a legal consideration for the contract of guaranty," the court said, "but such consideration need not have moved from the plaintiff to the defendant. If the guaranty was executed contemporaneously with the lease, and was an essential ground of the credit extended to the lessee, that was a sufficient consideration. . . . If the guaranty was executed subse-

quently to the lease, it will be deemed to have been made contemporaneously with it, if delivered at the same time and before the lessee was permitted to occupy the rooms. . . . The consideration stated in the guaranty, namely, 'the letting of the premises as above described,' was a sufficient one, and was proved by the facts showing that the lease signed by the lessee was not delivered to the plaintiff until after it had been signed by the defendant, that it was so executed and delivered before the commencement of the term and before the lessee commenced his occupancy, and that the plaintiff rented the rooms to Thomas J. Gaines, Jr., upon the faith of the defendant's guaranty." So, too, in the case of Cumberland Glass Mfg. Co. v. Wheaton, 208 Mass. 425, 94 N. E. 803, and which was an action against four guarantors on account of the nonperformance by a certain corporation of a contract to purchase 2,000 gross of bottles, and where it appeared that the contract of sale and guaranty was signed by all of the four defendant guarantors, and was delivered to the plaintiff by one of them, the court said: "But if the contract of sale was accepted and the principals became bound, the defendants assert that they were not bound for want of notice to them of the acceptance of the guaranty. If the defendants' undertaking had been merely a contingent offer to become responsible, notice to them of the plaintiff's acceptance would have been necessary to complete the guaranty. . . . The instrument, however, was executed and delivered by them to the treasurer, who was one of the guarantors, and the defendants do not contend that they were ignorant of its contents or of the purpose for which they signed, or of the fact that it was to be delivered by him to the plaintiff. Having made the treasurer and coguarantor their agent, they were bound by his acts in the formation and completion of the contract and his knowledge of the plaintiff's acceptance or affirmation, as if they had been individually present. . . . The delivery and acceptance of the contract of sale, and the incorporated contract of guaranty, which was absolute and unconditional, were contemporaneous, and the sale of the goods and the extension of credit in reliance upon the guaranty were consummated as the parties intended by one connected transaction. A further or final notice of acceptance under these circumstances would have been a vain and useless act." See also Moses v. National Bank, 149 U. S. 298, 37 L. ed. 743, 13 Sup. Ct. Rep. 900; Fisk v. Stone, 6 Dak. 35, 50 N. W. 125.

The rule, indeed, is clearly laid down by Story in his work on Contracts, 5th ed. vol. 2, § 1133, where he says: "The only notice to which the guarantor has a strict right is notice that his proposal of guaranty is accepted and will be acted upon, *and this right may be waived by the form of the guaranty or by the manifest intention of the parties as implied thereby.*" Not only, indeed, was there an express waiver of acceptance and notice, but the case seems to come within that of Whitney v. Groot, 24 Wend. 82, which was cited with approval by Judge Story, and where the guaranty, "If you will let A have $100 worth of goods on three months' notice, you may consider me as guarantying the same," was held to require no notice of acceptance. In the case at bar the guarantors signed the guaranty attached to the original contract, which was, as yet, unsigned by the medical company. They left it so signed by them in the hands of Laursen for delivery to the company. They, to all intents and purposes, made Laursen their agent for delivery, and said to the company, "If you will deliver the goods, we will guarantee payment, and no notice on your part of acceptance of this proposition is necessary. If you deliver the goods to Laursen, that is sufficient notice to us." The delivery and acceptance of the contract and of the attached contract of guaranty, in short, being contemporaneous, and the sale of the goods and extension of credit being made in reliance both upon the contract and the guaranty, and in the course of one connected transaction, notice of acceptance would hardly have been necessary, in the absence of the waiver, and the waiver has dispelled all doubt upon the proposition. Moses v. National Bank, 149 U. S. 298, 37 L. ed. 743, 13 Sup. Ct. Rep. 900; Dan. Neg. Inst. § 1759.

The judgment of the District Court is affirmed.

THE NORTHERN TRUST COMPANY, a Corporation, v. THE FIRST NATIONAL BANK OF BUFFALO, NORTH DAKOTA, a Corporation.

(140 N. W. 705.)

One M. was treasurer of Cass county during the years 1907-10, inclusive, and the plaintiff furnished his official bond. Cass county claimed a shortage, and

sued and recovered judgment against this plaintiff for something over $7,000 defalcation. During the years 1907, 8, 9, said M. paid to this defendant some $2,564.22 upon his personal debt to defendant. Said payments were made by means of twenty-six checks upon the funds of Cass county, said checks being signed Cass county, North Dakota per M., Treasurer. After the trust company had paid the defalcation, it brought this suit against the defendant to recover said sums. Defendant demurs to the complaint.

Complaint — demurrer — judgment — suit — parties.

1. The complaint alleges that the said treasurer paid to defendant the said moneys of Cass county upon his private account, and that the defendant knew, or ought to have known, of the ownership of the funds. The complaint further alleges that Cass county recovered judgment against this plaintiff for a shortage of over $7,000. *Held*, that the allegations relative to the suit, by Cass county, pertained to the subject of the subrogation of plaintiff to Cass county's interest in the funds. The fact that a judgment was obtained against the surety company for a shortage in M.'s account will not be binding upon this defendant, who was not a party to the suit, but this plaintiff will have to prove the fact of the shortage upon the present trial.

Payments — allegation — accounts.

2. Defendant claims that there is no allegation that the wrongful payments made by the treasurer occasioned the shortage in his accounts. *Held*, that the above allegations necessarily imply a shortage, and that the same was occasioned by the wrongful payments of Cass county's money to defendant.

Unlawful payments — private debts.

3. Defendant claims that the complaint does not allege that the payments were unlawfully made. *Held*, that the allegation that the said M. paid and the defendant received the funds of Cass county upon the private debt of the said M. sufficiently alleges an unlawful use of the funds.

Remedy — bond — rights — subrogation.

4. Defendant contends that Cass county should have sued and recovered from the bank the funds in question before resorting to the bond of the trust company. *Held*, that Cass county was under no obligation to pursue this remedy before resorting to this bond; that § 6110, Rev. Codes 1905, controls, and that the plaintiff is subrogated to all the rights of Cass county.

Checks — payee — notice.

5. The fact that defendant received twenty-six checks drawn in the name of Cass county was sufficient notice to the payee of the checks that the moneys belonged to Cass county, and not to M.

Held, that the demurrer of the defendant was properly overruled.

Opinion filed February 3, 1913. Rehearing denied April 1, 1913.

Appeal from the District Court for Cass County, *Pollock*, J.

Affirmed.

Ball, Watson, Young, & Lawrence and *Pollock & Pollock*, for appellant.

Judgment against plaintiff as surety, on account of default of plaintiff's principal, has no effect upon the defendant. Rodini v. Lytle, 52 L.R.A. 165, and note.

Payment made to defendant by the county treasurer must have been made unlawfully and without authority. Rev. Codes, §§ 2461, 2489, 2463, 6107–6110.

Pierce, Tenneson, & Cupler, for respondent.

The checks were issued and signed in the name of Cass county, and this was sufficient to charge defendant with knowledge that it was receiving money belonging to Cass county, and not that of the treasurer. Coleman v. Stocke, 159 Mo. App. 43, 139 S. W. 216; Wolffe v. State, 79 Ala. 201, 58 Am. Rep. 590; Rochester & C. Turnp. Road Co. v. Paviour, 52 L.R.A. 790, and note, 164 N. Y. 281, 58 N. E. 114; Gerard v. McCormick, 14 L.R.A. 234, and note; Langlois v. Granon, 123 La. 453, 22 L.R.A.(N.S.) 415, 49 So. 18; Tomsecek v. Travelers' Ins. Co. 113 Wis. 114, 57 L.R.A. 455, 90 Am. St. Rep. 846, 88 N. W. 1013; Baldwin v. Tucker, 112 Ky. 282, 57 L.R.A. 451, 65 S. W. 841.

A surety who has paid the debt of his principal is entitled to be subrogated to the remedies and rights which the creditor had, against the principal and others. 37 Cyc. 415; National Surety Co. v. State Sav. Bank, 14 L.R.A.(N.S.) 155, and notes; Brandt, Suretyship, §§ 351–353; Keokuk v. Love, 31 Iowa, 119; Braught v. Griffith, 16 Iowa, 26.

A surety on a fiduciary bond will be subrogated to the right of the obligee to recover money taken by a third person on debt of principal. 37 Cyc. 417, note 16; Blake v. Traders' Nat. Bank, 145 Mass. 13, 12 N. E. 414; Boone County Bank v. Byrum, 68 Ark. 71, 56 S. W. 532; Rev. Codes 1905, §§ 6109, 6110; 37 Cyc. 373; Thurston v. Osborne-McMillan Elevator Co. 13 N. D. 512, 101 N. W. 892; St. Louis, A. & T. R. Co. v. Fire Asso. of Philadelphia, 55 Ark. 163, 18 S. W. 43.

Allegations of a pleading should receive liberal construction, with a view to substantial justice. Rev. Codes 1905, § 6869; Donovan v.

St. Anthony & D. Elevator Co. 7 N. D. 513, 66 Am. St. Rep. 674, 75 N. W. 809.

The complaint on demurrer must be deemed to allege all that can be implied from the allegations, by a reasonable and fair intendment. 4 Enc. Pl. & Pr. 755; Weber v. Lewis, 19 N. D. 473, 34 L.R.A.(N.S.) 364, 126 N. W. 105; 31 Cyc. 86.

Where an act is lawful on certain conditions, it is not necessary for plaintiff to negative the existence of such conditions; they constitute matter of defense. 15 Enc. Pl. & Pr. 429, and cases cited.

It is presumed that one who holds money or property as agent, trustee, executor, administrator, guardian, or partner has no authority to dispose of it in payment of his own debt. Gerard v. McCormick, 130 N. Y. 261, 14 L.R.A. 234, 29 N. E. 115; Second Nat. Bank v. Gardner, 171 Pa. 267, 33 Atl. 188.

BURKE, J. One M. was county treasurer of Cass county, North Dakota, for the years 1907–1910, inclusive, and the plaintiff trust company was his official bondsman. At the close of his term of office, the county of Cass claimed that he was short in his accounts something over $7,000, and judgment was recovered against the surety for such defalcation. Having paid the judgment, the trust company in its turn brought this action against the National Bank of Buffalo, North Dakota, to recover the sum of $2,564.22, the moneys which it is alleged belonged to said Cass county, but were wrongfully paid by said treasurer to said bank upon a private indebtedness.

The complaint, after alleging the formal matters of the election of the treasurer and the giving of the bond, further alleges: "That on the said second day of January, 1911, the said M. was short in his accounts as treasurer of said Cass county of public moneys in his hands, belonging to said Cass county, and failed to pay over and deliver according to law, to his successor in office, the sum of $7,258.28, and wholly failed and neglected to pay said sum or any part thereof.

"That thereafter said Cass county duly demanded of this plaintiff (the trust company), as surety upon the official bond of said M., as aforesaid, that said shortage be paid into the treasury of said Cass county, and that this plaintiff make good the sum of money aforesaid, and upon the failure of the plaintiff so to do, an action was duly and regu-

larly commenced in the district court of Cass county by the county of Cass as plaintiff, against this plaintiff as defendant, in which such proceedings were duly and regularly had; that on the 5th day of April, 1911, a judgment was duly and regularly entered against this plaintiff, and in favor of Cass county, North Dakota, for the sum of $7,258.28 for principal, $84.66 interest, and $7 costs, making a total judgment against this plaintiff, by reason of the defalcation of said M., as treasurer of Cass county, in the sum of $7,349.94; that thereafter and on the 6th day of April, 1911, this plaintiff was compelled to and did pay said judgment.

"That during the years 1907, 8, 9, the said M., as treasurer of said Cass county, deposited the money of said Cass county in the Commercial Bank of Fargo, Merchants National Bank of Fargo, and the first National Bank of Fargo, in the name of, and to the credit of, said Cass county, North Dakota. That between the 10th day of April, 1907, and the 21st day of September, 1909, both dates inclusive, said M. issued checks upon said banks, payable to the defendant herein, the First National Bank of Buffalo, North Dakota, in the aggregate sum f $2,564.22.

"That said checks were signed in the name of Cass county, North Dakota, and were issued and delivered by said M. and received by defendant in payment of the individual obligation of said M., and that defendant knew, or ought to have known, that the funds on which the same were drawn, were the moneys of the said Cass county, and not the moneys of said M. That defendant collected the respective amounts for which said checks were drawn, from the funds of said Cass county standing to the credit of said Cass county in such banks, with a knowledge aforesaid, and now holds and retains said sum of $2,564.22 to and for the use and benefit of the plaintiff herein, the said sum being a part of the amount for which judgment was recovered by said Cass county and paid by this plaintiff." Then follows an itemized statement of the checks, twenty-six in number, and the banks on which they were drawn, with the date of payment, and a demand for judgment.

To this complaint the defendant demurred upon the ground that the complaint does not state facts sufficient to constitute a cause of action. This demurrer being overruled, the defendant has appealed to this court, and argues the following objections to the complaint, to wit:

First, that the judgment obtained by Cass county against the surety company is not binding upon the defendant bank; second, that the complaint fails to show that the defalcation was caused by the payments made by the treasurer to defendant; third, that the complaint fails to allege that said payments were unlawful; fourth, that the surety company should have compelled Cass county to proceed against this defendant, before making good the defalcation; and, fifth, that the complaint states no knowledge upon the part of the defendant bank, excepting that the checks were signed by Cass county, which fact they contend is insufficient to charge defendant with knowledge of the unlawful use of such funds. We will take up and dispose of these propositions in the order named. It is, of course, well settled in this state that a complaint will be given a liberal construction when attacked by demurrer. See § 6869, Rev. Codes 1905; Weber v. Lewis, 19 N. D. 473, 34 L.R.A. (N.S.) 364, 126 N. W. 105. However, said rule has never extended so far as to supply any material allegation that may be omitted from the complaint.

(1) The defendant cites many cases, holding that a judgment recovered against a principal upon a bond is not conclusive against the surety who has not been joined in the suit. We agree fully with the said authorities, but do not believe that they apply in this case. The complaint above set forth is not a model by any means, but we think liberal construction shows that the pleader intended to plead a shortage occurring between April 10, 1907, and September 21, 1909, during which time the treasurer gave twenty-six checks upon the Cass county fund, to defendant in payment of his personal indebtedness. It is hard to see how the defendant could use this money of the county to pay his personal debt to defendant, without creating a shortage. It is further alleged in the complaint that judgment was recovered against the surety company for the said sums, "the said sum being a part of the amount for which judgment was recovered by said Cass county and paid by this plaintiff." The plaintiff, having in this rather crude manner alleged a shortage, will be obliged to substantiate those facts with proof upon the trial. We do not understand that he intends to supply this proof by offering the judgment obtained by Cass county against itself, the surety company. Those parts of the complaint which set forth that the treasurer was short in his accounts, and that Cass county obtained

judgment for such shortage against the surety company, are, we think, pleaded to show the right of this plaintiff to be subrogated to the rights of Cass county. The defendant is not estopped to deny the shortage of the treasurer in this action, because such shortage was determined in the prior action. This disposes of defendant's contention that he will not be allowed to litigate this question.

(2) Taking up the second proposition, that the complaint does not allege that the shortage was occasioned by the wrongful payments made by the treasurer to the defendant, we have much the same answer to make as in paragraph one. The language, "that on said 2d day of January, 1911, the said M. was short in his accounts," was used in connection with the bringing of the suit against the surety company, and not in alleging the shortage. The allegations that twenty-six checks, aggregating $2,564.22 of the moneys of Cass county, were paid to the defendant in the years 1907, 8, 9, and that said payments were received by defendant in payment of the individual debt of the treasurer, and that the defendant knew, or ought to have known, that the money belonged to Cass county, are sufficient to apprise the defendant of the nature of the claim against them, and sufficient to support the complaint against said attack.

(3) The third objection is that the complaint does not allege that the payments were unlawfully made. Defendants, in their brief, say that it is a fair presumption that the county treasurer paid out no money, excepting upon warrants duly signed and delivered to him. Conceding this, we think that said presumption is negatived by the allegation that the checks were signed in the name of Cass county, and were delivered and received in payment of the individual debt of the treasurer, with the knowledge of defendant.

(4) Defendant contends that Cass county should have proceeded against the bank of Buffalo, and recovered this amount, before bringing suit against the surety, and refers us to § 6107, Rev. Codes 1905. We do not believe there is any merit in this contention. Cass county might have so proceeded, but was under no obligation so to do. Section 6107 merely says that a surety *may* require his creditors to pursue other remedies. Section 6110, Rev. Codes 1905, reads as follows: "A surety, upon satisfying the obligations of the principal, is entitled to enforce every remedy which the creditor then has against the principal, to the

extent of reimbursing what he has expended . . . ." See also 37 Cyc. 415; National Surety Co. v. State Sav. Bank, 14 L.R.A.(N.S.) 155, 84 C. C. A. 187, 156 Fed. 21; 13 Ann. Cas. 421; Brandt, Suretyship, §§ 351–353; American Bonding Co. v. National Mechanics' Bank, 99 Am. St. Rep. 466, and note; Nelson v. Webster, 72 Neb. 332, 68 L.R.A. 513, 117 Am. St. Rep. 799, 100 N. W. 411. We think the bond company was subrogated to every right that Cass county had to bring this suit.

(5) Defendant contends that the mere fact that the twenty-six checks received by it were signed in the name of Cass county is not sufficient to apprise it of the fact that the money actually belonged to Cass county, and not to M., the treasurer. This matter is fully discussed in a note in 14 L.R.A. 234, in the leading case of Gerard v. McCormick, 130 N. Y. 261, 29 N. E. 115; 7 Century Dig. § 844; 40 Century Dig. §§ 501, 550. In the New York case, supra, a check signed "Wm. Boswell, Agt. Glass Building," was sufficient to apprise the payee of the check that he was receiving trust funds. The facts in this case are much stronger. Here there were twenty-six separate checks, all signed in the name of Cass county, and there is no escaping the presumption that the bank knew that it was receiving Cass county's money unlawfully.

Having disposed of all of the objections to the complaint, it follows that the order of the trial court, overruling the demurrer, must be affirmed.

NORTH DAKOTA COMPANY v. MIX.

(141 N. W. 68.)

Appeal — default — order — excuse — penalty — attorney's fees — discretion — abuse of — taxable costs.

Plaintiff brought action for $1,125. Defendant counterclaimed for $1,600. Judgment entered in favor of defendant for amount of counterclaim upon the failure of plaintiff to appear at time of trial. Application to be relieved from such default judgment was made under § 6884, Rev. Codes 1905, and allowed, but upon condition that plaintiff pay to defendant the sum of $500. *Held*, that

upon an appeal wherein the correctness of the order relieving plaintiff's default is not questioned, this court will consider only whether the terms imposed are just. If the trial court finds that the plaintiff has excused his default, the terms imposed should not be in the nature of a penalty upon plaintiff. If he has not excused his default, his application should have been denied. The sum of $500 was allowed upon the theory that defendant had been put to the expense of a trip to Cuba, costing him $300, had incurred the sum of $150 expense for attorney's fees, and for $50 taxable costs. *Held*, for reasons stated in the opinion, that the expenses of the trip to Cuba were in no manner chargeable to the default of plaintiff, and that the allowance of the said attorneys' fees and costs is excessive and an abuse of discretion. Under all the circumstances of the case anything allowed over the sum of $100 was an abuse of discretion of the trial court. Judgment reduced to said sum of $100.

Opinion filed April 2, 1913.

Appeal from the District Court for Sheridan County; *Winchester*, J. Modified.

Page & Englert, for appellant.

Courts favor the trial of causes upon the merits. Haggerty v. Walker, 21 Neb. 596, 33 N. W. 244; Citizens' Nat. Bank v. Branden, 19 N. D. 489, 126 N. W. 102.

In an application to open a default judgment and interpose a meritorious defense, courts should not penalize the applicant, as a condition. Rev. Codes 1905, § 6884; Olson v. Sargent County, 15 N. D. 146, 107 N. W. 43.

The court abuses its discretion in imposing upon plaintiff such penalty, in the form or nature of terms. Colean Mfg. Co. v. Feckler, 16 N. D. 227, 112 N. W. 993; Cline v. Duffy, 20 N. D. 525, 129 N. W. 75.

In applications to set aside default judgments, and permit defendants to answer and defend, courts undoubtedly have the right to impose just terms. Hopkins v. Meyer, 76 App. Div. 365, 78 N. Y. Supp. 459; Colean Mfg. Co. v. Feckler, supra.

Geo. Thom, Jr., of Denhoff, North Dakota, for respondent.

BURKE, J. In June, 1910, this action was instituted by the plaintiff to recover the sum of $1,125. The defendant counterclaimed in the

sum of $1,600. After reply, issue was joined and the case placed for trial upon the March, 1911, term of district court for Sheridan county. Just prior to the said term the defendant made a business trip to the island of Cuba, leaving the case in the hands of his attorney at Denhoff, North Dakota. Shortly after his arrival in Cuba, and before he had time to transact the business which took him there, he received notice from his attorney that the case would be called for trial at said term, and thereupon he returned to North Dakota. After he had left Cuba, the plaintiff's attorneys, who resided in Valley City, North Dakota, requested a continuance of the case because there had been called a special term of court in Valley City which conflicted with the Sheridan county term. Defendant's attorney replied that he would take the matter up with his client upon his return from Cuba, and would notify them accordingly. Upon defendant's return he declined to continue the case, and plaintiff's attorneys were accordingly notified. They immediately wrote to defendant's attorney, asking him to have the case set for a day certain, and to notify them so they might be present with as little loss of time as possible. The defendant's attorney disregarded this request, and when the case was called for trial obtained the judgment in favor of the defendant by default for the full amount of his counterclaim. Upon learning of this judgment, plaintiff made application under § 6884, Rev. Codes 1905, to be relieved from his default, and made a showing to the trial court with the result that the application was granted, but upon the express condition that the plaintiff pay to the defendant the sum of $500 within thirty days from the date of said order. This appeal is from that part of the judgment which requires the payment of said sum. There has been no appeal taken from the portion of the order excusing the plaintiff's default, and we cannot consider the correctness of the same. It appears from the affidavits filed that the trial court allowed defendant the $500 for the following items: $300 for a trip to Cuba and return, $150 for attorneys' fees, and $50 taxable costs. The sole question presented to this court is whether or not said sums are reasonable under the circumstances of this case. Said § 6884 authorizes the court: "In its discretion and upon such terms as may be just, at any time within one year after notice thereof, relieve a party from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or ex-

cusable neglect." Trial courts have a wide discretion in allowing terms upon this kind of an order, and their judgments should not be disturbed excepting for an abuse of discretion. In the case at bar the affidavits upon which the said order was based are before us, and it is our duty to review the discretion of the trial court. An examination of the affidavits shows that the plaintiff itself was guilty of no negligence whatever. It had intrusted its case to an attorney, and heard nothing further from any source until after judgment had been entered against it by default. Whatever negligence there may have been is chargeable directly to plaintiff's attorneys. This negligence has been excused by the court, by its unchallenged order reopening the default. The purpose of allowing terms in a case of this kind is not to penalize the plaintiff, but to reimburse the defendant for damages occasioned by the delay. The defendant showed by his affidavit that he is a resident of North Dakota, and that, just before the said term of court, in the month of February, 1911, he went to the island of Cuba for the purpose of attending to his interests there. That early in the month of March he received notice from his attorney to return at once to attend to said case. That he did so return for the purpose of attending said trial, and was compelled to leave Cuba before he had been able to attend to his business there, and that for this reason his trip to Cuba was of no benefit to him whatever, for the reason that he was called back to attend to this case before he could attend to his business. He further states that he has agreed to pay his attorney the sum of $150 for attorneys' fees for his services in obtaining judgment in defendant's favor in said action. He does not state that he actually returned to Cuba upon a second trip. It will be noticed that plaintiff was in no manner to blame for defendant's absence from the state when the case was about to be called. Nor was the fact that the plaintiff was not present at the trial in any manner to blame for the said expense. It was the business of the defendant to be present at the March term of court, and had he been there, and the case had been called for trial, he would not have incurred such additional expense. The fact that plaintiff defaulted on the day of trial had nothing to do with the expenses of the trip to Cuba. In other words, had there been no default and the trial had been had upon its merits the defendant would have been obliged to return from Cuba, leaving his business there unfinished just as he did under the existing circum-

stances. We do not believe defendant was entitled to anything upon this count. The question of the $150 attorneys' fees is also subject to criticism. While the defendant is probably entitled to the difference between what he would have had to pay his attorney for one single trial, and what he will have to pay him for two trials, yet in this case there is no showing of any difference due the attorney. All that the affidavit of the defendant shows is "that deponent has agreed to pay his attorney the sum of $150 for attorneys' fees for his services in obtaining judgment in defendant's favor in said action; that, if said action is tried again, deponent must pay another attorneys' fee for trying said action; and that, if the judgment is vacated, deponent will be damaged in the sum of $150 attorneys' fees. . . ." It will be noticed that under the wording of this affidavit it is impossible to say how much difference the defendant will have to pay his attorney on account of this postponement. Under all the circumstances, we think that the trial court allowed an excessive amount, and that everything over the sum of $100 was an abuse of discretion. The trial court will modify its order so as to allow the plaintiff to be relieved from his default upon paying of said sum of $100 to defendant.

Appellant will recover his costs in this case.

STATE EX REL. MILLER, Attorney General, et al. v. HALL, Secretary of the State of North Dakota, Gunder Olson, Treasurer of the State of North Dakota, and Carl Jorgenson, Auditor of the State of North Dakota, as Commissioners of Public Printing in and for the State of North Dakota, and the Journal Publishing Company of Devils Lake, North Dakota, Intervener.

(141 N. W. 124.)

Attorney general as relator — refusal of use of name — citizens — taxpayer — action.

1. When the attorney general refuses to consent to the use of his name as a relator, in an action brought to enjoin certain state officials from proceeding under a contract, under which it is claimed work contracted for therein is being

done contrary to the express terms of a statute on the subject, a citizen and taxpayer of the state may maintain such action as relator and in the name of the state.

Contract — lease — character of instrument.

2. Although a contract is termed a lease by the parties thereto, and is so mentioned in the contract itself, its character is not thereby established, but must be determined from its terms and conditions rather than from the name applied to it by the parties.

Contract — material — sale — state printing.

3. A contract set out in the body of this opinion considered, and *held* to be a contract for the sale of material, the furnishing of labor, the renting of printing machinery and other property necessary to the conduct of a printing plant, the use of floor space, etc., to enable the party of the second part to do certain state printing, binding, etc., in the city of Bismarck; and that on its face it does not disclose that it was intended by the parties as an evasion of the statute, chapter 185, Laws of 1907, requiring certain state printing to be done only by established and qualified printing and publishing houses that have been established and in continuous business in this state not less than one year.

Contract — evidence — evasion.

4. The facts surrounding the information of the Dakota Stationery & Printing Company, a North Dakota corporation, and the negotiations and execution of a contract between it and the Journal Publishing Company, of Devils Lake, which has the contract for certain classes of state printing, and the dealings between said parties, are examined in this opinion, and *held* not to warrant this court in holding that the contract above referred to between said printing companies was intended or used for the purpose of evading the provisions of chapter 185, Laws of 1907, above referred to, or in violation thereof.

Opinion filed April 7, 1913.

Appeal from a judgment of the District Court for Burleigh County; *Nuessle,* J.

Affirmed.

Statement by SPALDING, Ch. J. This action was brought in the district court of Burleigh county, in the name of the state on the relation of the attorney general, and S. F. Knight, against the secretary of state, state treasurer, state auditor, as the commissioners of public printing, for the state, for the purpose of enjoining and restraining the defendants from delivering to the Dakota Printing & Stationery Com-

pany, a corporation, of Bismarck, North Dakota, any of the public printing within the third and fourth classes, and from paying or approving, or authorizing the payment of, any bills or expenses incurred by reason of doing public printing of those classes by said Dakota Printing & Stationery Company; and to have a certain contract which had been entered into on behalf of the state by the commissioners of public printing and the Journal Publishing Company, of Devils Lake, North Dakota, canceled and set aside. In brief, the complaint alleges that Andrew Miller is the lawful, qualified, and acting attorney general of the state, and that the relator, Knight, is a citizen and taxpayer of the county of Cass. It then alleges the execution of a contract between the defendants, the Commissioners of public printing, on or about the 1st day of August, 1912, with a domestic corporation known as the Journal Publishing Company of Devils Lake, under and by virtue of the provisions of Article 4, chapter 2, of Rev. Codes 1905; and that said contract relates to and covers the third and fourth classes of printing as defined in said article; that on or about September 3, 1912, the Dakota Printing & Stationery Company, a domestic corporation, was organized to do a general publishing and printing business, and has been established in such business only since the month of September, 1912; that the principal place of business and office of the journal company is at Devils Lake; that the Dakota Company has entered into no contract with said defendants or the state for the doing of any public printing whatsoever; that the only contract relating to public printing of the third and fourth classes with the state is with the journal company; that said defendants, notwithstanding the provisions of article 4 of chapter 2, Rev. Codes 1905, and of § 49 of said article, and the provisions of § 2282, Rev. Codes 1905, as amended by chapter 185, Laws of 1907, have been and now are delivering public printing of the third and fourth classes to the Dakota Priting & Stationery Company, and that all of such classes of printing that have been done since the 3d day of September, 1912, have been done by said Dakota Printing & Stationery Company; and that defendants, unless restrained, intend to continue to deliver to said Dakota Company all the balance of the third and fourth classes of printing, and to have it done by said Dakota Company, and to allow and pay said Dakota Company for such work; that the petitioner has demanded from the commissioners of public printing that they cease

and desist from delivering said third and fourth classes to said Dakota company, and has advised such commissioners that to so deliver is in violation of the contract existing between the state and the journal company and of the law, but that said commission has wholly refused to cease and desist from so doing, and that relator is advised by said board that it intends to have all printing within the third and fourth classes of printing done by said Dakota company unless restrained; that said Dakota company is not a qualified and established printing and publishing house within the state, and has not been conducting a printing and publishing business within the state for more than a year; that such delivery of printing of said classes to the Dakota company has been done at the request and with the approval of the said journal company, which has not done or performed any of its duties under the contract referred to, but that, through collusion and agreement between said journal company and said Dakota company, such printing is being done by said Dakota company; that the petitioner has no speedy and adequate remedy at law; that he has applied to the attorney general, and demanded that he bring and prosecute an action to restrain defendants from continued violation of law in relation to such printing, but that the attorney general has refused so to do.

The defendants answered, and the Journal Publishing Company of Devils Lake, by leave of court, intervened and filed a complaint in intervention, wherein it alleged that it had been for more than seven years a corporation, duly organized and existing under the laws of the state of North Dakota, with its office and principal place of business at Devils Lake; that it has a well-equipped and appointed plant for doing all classes of printing in a prompt, careful, and efficient manner; that the printing commission, on the 30th of July, 1912, pursuant to bids requested and obtained in the manner provided by law, accepted the bids of, and entered into four separate contracts with the intervener, covering the first four classes of public printing required by the state for the two years commencing January 1, 1913; and that said intervener, upon being awarded such contract, qualified as a public printer for the state in the manner provided by law, and entered upon the discharge of its duties, and has, ever since, continued to carry out the provisions of said contract; that in order to better facilitate the performance of its duties as public printer for the state, and especially

as to promptly printing bills introduced into the legislative assembly and the journals of the house and senate, the intervener, on December 1, 1912, leased the equipment of the Dakota Printing & Stationery Company in Bismarck for the two years referred to, its printing and binding machinery, fixtures, presses, etc., and all machinery and apparatus that may be required by said journal company in carrying out the provisions of its contracts with the state; and that by such lease it was agreed between the parties thereto that the Journal Publishing Company should have sole and exclusive use of all such machinery and materials contained in the plant of the Dakota company whenever the journal company might so desire; and that thereby the Dakota company agreed to furnish all help required to operate such machinery and printing apparatus, while in the use of said journal company, required to carry out its contract with the state; that under such lease the journal company has dominion and control over the necessary printing apparatus and the equipment in the city of Bismarck to properly carry out all the provisions of this contract with the state; that after the journal company had qualified, it entered upon the discharge of its duties as public printer, and had ever since continued to perform them in accordance with the contract; that the commissioners of public printing delivered to the journal company all printing required to be done for the state embraced within said four classes, and to no other person or persons, except such as was unlawfully delivered to the relator, Knight; that such printing was received by said journal company, from time to time, as delivered by the defendants, and properly done; that the defendants are delivering to said journal company public printing pursuant to said contracts therewith, and not otherwise; that the intervener intends to perform all the work under such contracts in accordance therewith, and that most of the third and fourth classes are intended to be done and performed at its plant in the city of Devils Lake; that no such printing of the third and fourth classes had ever been delivered to the Dakota Printing & Stationery Company, but that it had been delivered to said journal company and by it done in compliance with its contract.

The answer of the defendants is the same as the complaint of the intervener, except that it states that it is the intention of defendants to continue to deliver to the Journal Publishing Company all the bal-

ance of the printing provided for in its contracts with the state, at the times and in the manner and upon the conditions specified in said contracts, and not otherwise. The contract referred to between the two printing companies is as follows:

This Agreement, made this 1st day of December, A. D. 1912, by and between the Dakota Printing & Stationery Company, a corporation, of Bismarck, North Dakota, party of the first part, and the Journal Publishing Company, a corporation, of Devils Lake, North Dakota, party of the second part;

Witnesseth, That, Whereas, the party of the second part has entered into a certain contract with the state of North Dakota to do for the said state of North Dakota all the first, second, third, and fourth class printing required to be done by the state of North Dakota during the biennial period beginning January 1, 1913, and Whereas, the party of the second part desires to secure and have the use of certain printing and binding machinery in the city of Bismarck, North Dakota, during the said biennial period;

The said party of the first part hereby covenants and agrees to and with the said party of the second part, for the consideration hereinafter named, to let and lease to the party of the second part during the biennial period beginning January 1, 1913, and ending December 31, 1914, the following described printing and binding machinery, apparatus, and fixtures which the said party of the first part agrees to have at such times as said party of the second party may require the use of the same in the city of Bismarck, North Dakota; all presses, paper cutters, stitchers, binding machinery, stones, stands, racks, type, reglet, and all machinery and apparatus that may be required by said Journal Printing Company in carrying out the provisions of its said certain contract with the state of North Dakota for printing, publishing, and binding for the said state of North Dakota, the first, second, third, and fourth classes of printing during the biennial period beginning January 1, 1913, and ending December 31, 1914.

And it is hereby covenanted and agreed by and between the parties hereto that the said Journal Publishing Company, party of the second part, shall have the sole and exclusive use of all of said machinery and materials whenever it may so desire at any time of day or night during

said biennial period, and it is further conditioned that the party of the first part is privileged to use said machinery and material at any time when the same are not in use by the party of the second part; and the party of the first part hereby agrees to furnish all help which may be required to operate said machinery and printing apparatus while in use by the party of the second party, and to carry in stock and to furnish all materials to the party of the second part as may be required in carrying out the provisions of said contract with the state of North Dakota at cost price plus 10 per cent for said materials and labor so furnished, and the party of the second part hereby covenants and agrees to pay to the party of the first part for the rental and use of said machinery, apparatus, and fixtures furnished, in addition to the price of the cost of materials and labor furnished plus 10 per cent the sum of two hundred fifty dollars ($250) per month;

And it is further covenanted and agreed that the party of the second part shall pay, at the end of each month, the said agreed price for materials and labor furnished by the party of the first part to the party of the second part, and the said sum of two hundred fifty dollars ($250) monthly rental.

In witness whereof the parties hereunto have set their hands and seals the day and date first above written.

Dakota Stationery & Printing Company, Signed, sealed, and delivered in presence of

By Lee F. Warner, Its Vice President,
By E. H. Dummer, Its Secretary,

Eugene D. Nims,
Ed. Morgan.

Journal Publishing Company,
By J. H. Bloom, its Manager,
empowered to make and enter into
all contracts and agreements,

(Seal) By ..... Its Secy.

A trial was had in the district court, and findings made and judgment entered dismissing the action, both on the facts and because the court found the law referred to, namely chapter 185, Laws of 1907, unconstitutional. All the evidence is before us, and we are required to

try the case *de novo*. Chapter 185, Laws of 1907, requires all state, county, and other public printing, binding, and blank book manufacturing, etc., to be done only by established and qualified printing and publishing houses that shall have been established and in continuous business in this state not less than one year. It contains numerous other provisions, which are not material to the determination of this appeal. The testimony taken occupies a great deal of space, and we think to set it out in full would be useless, and we content ourselves with now stating in general what it shows. In our opinion other parts will be referred to.

At the time of entering into the contract with the state the journal company maintained, and had for more than a year theretofore, a plant at Devils Lake, adequate and suitable to do the state printing of the classes mentioned, but that the printing of the first and second classes had to be done largely during the sixty days' session of the legislature, and much of it had to be completed and delivered within twenty-four hours after the copy was received. These facts made it impracticable for the journal company to do those classes of work in Devils Lake. It, therefore, in order to comply with its contract, had to provide a suitable plant in the city of Bismarck, and it did this by means of the contract above set out. The record shows that, at the time of the trial, no third or fourth class matter had been done in Bismarck, except a trifling amount, which formed an exception to the requirements of the contract. The relation between the parties who incorporated the Dakota Company, and J. H. Bloom, principal owner and manager of the journal company, is also shown. Bloom also owned one thirtieth part of the capital stock of the Dakota company, and had more or less to do with the organization of that corporation. All the printing of each of the four classes that had been done at the time of the trial had been delivered to Bloom as the manager of the journal company, and receipted for by him in the name of the journal company. Seven thousand dollars had been advanced on an estimate, and warrants for that amount drawn to the journal company, and delivered to Bloom. That amount was thereafter by him paid to the Dakota company under their contract. This sum was considerable less than the total amount due for printing done. Bloom testified that his plant at Devils Lake was ample to do the third and fourth class printing,

and that it was his intention to do the greater portion of those classes in the Devils Lake plant. He was not inquired of, and did not testify; and there is no evidence in the record as to where any part of the third and fourth classes not done at Devils Lake will be done. The relator contends that all the circumstances surrounding all the transactions related in the record, and the character of the so-called lease, are such as to require the court to find that such lease is but a makeshift to enable the Dakota company to do the public printing of the third and fourth classes in violation of law; that in fact the Dakota company is doing, and will do such printing, rather than the journal company. On the other hand, it is contended that the reason for the Dakota company entering upon the scene is as stated above; namely, that the necessities regarding the legislative printing would not admit of the time being used between its receipt and delivery necessary to send it to Devils Lake and get it back to Bismarck in time for legislative use, and that, while the Journal company is not only doing and proposing to do the greater portion of the work at Devils Lake, if any of it is done at Bismarck it is in fact and in law done by the journal company, and not by the Dakota company. The first and second class printing, which include the legislative printing, are not involved in this action, it being conceded that the state has a right to let that to outside printers in certain conditions which existed when the work was let to the journal company.

Barnett & Richardson and *Lawrence & Murphy,* for appellants.

The relator, a citizen and taxpayer, may maintain this action. A taxpayer can bring and maintain an action to restrain the illegal payment of public funds. Weatherer v. Herron, 25 S. D. 208, 126 N. W. 244; Frame v. Felix, 167 Pa. 47, 27 L.R.A. 803, 31 Atl. 375; State ex rel. McCue v. Blaisdell, 18 N. D. 55, 24 L.R.A.(N.S.) 465, 138 Am. St. Rep. 741, 118 N. W. 141.

The legislature has power to require the state printing to be done within the state. Tribune Printing & Binding Co. v. Barnes, 7 N. D. 591, 75 N. W. 904.

Statutes must be construed with reference to the legislative intent and to the object intended to be accomplished. People v. Dana, 22 Cal. 11.

An agreement to contravene a statute, in fraud of the public or to the injury of private parties, savors of a conspiracy. Collins v. Blantern, 2 Wils. 341; Blasdel v. Fowle, 120 Mass. 447, 21 Am. Rep. 533; Brooks v. Cooper, 50 N. J. Eq. 761, 21 L.R.A. 617, 35 Am. St. Rep. 793, 26 Atl. 978; People v. Soule, 74 Mich. 250, 2 L.R.A. 496, 21 N. W. 908; Thomp. Corp. p. 35; Kendall v. Klapperthal Co. 202 Pa. 596, 52 Atl. 92.

Andrew Miller, Attorney General, and *John Cormady, Alfred Zuger,* and *C. L. Young,* Assistants Attorney General, for respondents.

The relator cannot maintain this action, because the rights sought to be secured are merely private, and he having failed to show that his individual interest is affected in some way peculiar to himself. He has no interest different from that of any other taxpayer. State ex rel. Dakota Hail Asso. v. Carey, 2 N. D. 36, 49 N. W. 164; Carter v. State, 8 S. D. 153, 65 N. W. 422; Leader Printing Co. v. Lowry, 9 Okla. 89, 59 Pac. 242; Devlin v. New York, 63 N. Y. 8; Anderson v. DeUrioste, 96 Cal. 404, 31 Pac. 266; Rev. Codes 1905, Sec. 5226.

Chapter 185, Laws of 1907, is unconstitutional and void as against public policy. Van Harlingen v. Doyle, 134 Cal. 53, 54 L.R.A. 771, 66 Pac. 44; State v. Pennoyer, 65 N. H. 113, 5 L.R.A. 709, 18 Atl. 878; Evansville v. State, 118 Ind. 426, 4 L.R.A. 93, 21 N. E. 267.

The case of Tribune Printing & Binding Co. v. Barnes, 7 N. D. 591, 75 N. W. 904, cited by appellant—differentiated.

The title to this law is too narrow to cover the subjects embraced within the body of the act, because, in addition to prescribing the qualifications of printers, it seeks to guard against illegal combinations in bidding, etc. Sutherland, Stat. Constr. § 87; State ex rel. Standish v. Nomland, 3 N. D. 427, 44 Am. St. Rep. 572, 57 N. W. 85.

SPALDING, Ch. J. It is first contended that the plaintiff-relator cannot maintain this action, for the reason that the rights sought to be secured are private only. We are of the opinion that the relator is qualified to bring this action. He is interested as a taxpayer and as a citizen, and it would seem that there must be someone who may champion the interests of the state in case the attorney general, as in this case, refuses to do so. We need not discuss the subject further, because we have so recently passed upon it in State ex rel. McCue v.

Blaisdell, 18 N. D. 55, 24 L.R.A.(N.S.) 465, 138 Am. St. Rep. 741, 118 N. W. 141. See also Frame v. Felix, 167 Pa. 47, 27 L.R.A. 803, 31 Atl. 375, which is directly in point.

2. We will next consider what character is impressed upon this contract on its face. Is it a lease or is it virtually an assignment of the contract between the state and the journal company? Is it a hiring by the journal company of the work done, or is it a contract for the hiring of the use of the machinery belonging to the Dakota company, a contract for the purchase of material from it, and a contract by the Dakota company to furnish these things and the help necessary to do the work? It is immaterial what the contract is denominated by the parties, as its terms and conditions, rather than the name applied to it, must govern. If it is a lease, or if it is a contract for the use or hiring of machinery, purchase of material, and to furnish these things and the help, it is evident that, as far as it discloses on its face, it could be entered into lawfully by the parties without affecting the contract between the journal company and the state, or the rights of the state or any citizen within it. On the other hand, if it is merely a subterfuge or a device to cover up the real intent of the parties, and is, in fact, only a method of transferring the doing of the work from the journal company to the Dakota company, then work of the third and fourth classes done under it must be done in violation of the terms of chapter 185, Laws of 1907. It is apparent on the face of it that it provides for the use by the journal company of the presses and machinery, etc., belonging to the Dakota company. It is clearly apparent that it is an agreement on the part of the Dakota company to sell to the journal company material for its use in carrying out these contracts. The journal company is given possession of all the property that it requires for its use during the two years covered by the contract, at all times, day or night, when it has use for it and desires to use it. It has possession at all such times to the exclusion of the Dakota company. The fact that the Dakota company may have the right to use the plant when the journal company has no use for it, and it would otherwise be idle, as far as we are able to see, in no manner casts a cloud of suspicion upon the intent of the parties in entering upon the contract. The journal company did not make the contract cover miscellaneous work for outside parties; it only covers the state work, and this pro-

vision for the Dakota company using the plant when not in use by the journal company was undoubtedly made in contemplation of the journal company not having work to employ the plant, or all of it, during the entire period covered by the contract. It cannot prejudice the journal company to have it in use by the Dakota company during such times as the plant would otherwise remain idle; and we see nothing in this proposition that in any way militates against the construction that, so far as the plant is concerned, it is a hiring by the journal company. As to the purchase of material, it will be noticed that the contract requires the Dakota company to carry in stock and furnish to the journal company the material, which we suppose includes printing paper, leather used in binding, and other material entering into the manufacture of pamphlets and such books as are required by the state within these classes. The journal company is not a manufacturer of material, and it has to purchase it somewhere and of someone. To carry in stock the amount of material of this nature required for the state printing manifestly requires considerable capital,—possibly capital in excess of that of the journal. As to this we are not informed. It must be of considerable advantage to the journal company to have the stock available in Bismarck, and thereby avoid the delay which would at times occur if compelled to order from jobbing points. For these reasons the allowance of 10 per cent which is provided for in the contract on such material does not seem to us, on its face, to be so large as to alone cast suspicion upon the parties or their contract.

The most difficult question relates to the furnishing of the help, which we assume includes typesetters, machine operators, such binders as may be necessary, etc. It is not perfectly clear that this contract might not be considered in respect to the help as providing simply for the Dakota company doing the work of the journal company, but when read in connection with the other provisions of the contract, particularly those relating to the material and the use of the plant, and considered in the light of well-known facts as they exist in the labor world, we think it entirely consistent with the theory that the employees when engaged on the work of the journal company are the employees of the latter. As far as indicated by the contract, at such times they are under the dominion and control of the journal company. There is nothing to disclose that the Dakota company directs the manner in which

the work shall be performed, the hours of employment, or assigns different workmen to different classes of work. It would rather appear that all this is done by the journal company. The contract in this respect does not materially differ from those engaging help in various employments through employment agencies or through the means of labor unions; and we are satisfied that the burden is on the relator to show that the employees are under the control and the direction of the Dakota company while doing the work, in order to prove his case. This he has not done. We may add that the contract in this respect is not so clear, but that evidence of the construction placed upon it by the parties would have much weight, but the burden is on the relator. We conclude that so far as the contract on its face is concerned it contains nothing inconsistent with the claims of the intervener and the state that it is a contract of hiring a plant, for the sale of material and the furnishing to the journal company of the help necessary to carry out its contracts with the state.

3. Does the evidence disclose such a condition of affairs and such circumstances surrounding the making of the contract between the journal company and the Dakota company, the doing of the work, and the relations of the parties, as to sustain the claim of appellant that such contract is only a device intended to conceal the fact claimed by appellant that the Dakota company is the party really doing the work, and that it is being done in violation of the statute referred to? We shall consider the additional facts claimed to bear upon this question largely as stated in the brief of appellant. It appears that in the spring of 1912, which was before the contract between the state and the journal company had been entered into, or taken effect, the journal company had a contract for the printing of a pamphlet known as the "publicity pamphlet" for the state, and hired it done by the Farnum Printing Company, of Minneapolis, and that this job was done in Minneapolis, Minnesota. We do not recall that it is disclosed in the record how the journal company happened to have this printing, but that is immaterial. The testimony shows that it was a very large job, one pamphlet being required to be sent to each elector in the state, that the time for the execution of the work was very limited, and, it is claimed, that no plant in the state was able to do the work in time so the pamphlet could be distributed when necessary. This is given as the reason why it was

done in Minneapolis, and it of course also appears that at that time the plant of the Dakota company in Bismarck had not been constructed or equipped. Bloom, the journal manager, secured the printing through negotiations with one Dummer, a traveling representative of the Farnum Printing Company. Bloom testifies that he did not then know who the officers of the Farnum Printing Company were. We need not consider whether this contract, or the doing of this work, was legal or not; and we assume that the reason why it is referred to is because, through it, Bloom undoubtedly got into touch and formed an acquaintanceship with the officers of the Farnum Printing Company, and that, when organized, the Dakota company stockholders were either officers or relatives or employees of the Farnum Printing Company, aside from Mr. Bloom. It seems to be the contention of appellant that this fact casts suspicion upon their relations, and tends to show that the Farnum Printing Company is really the Dakota company and a Minnesota concern, rather than a North Dakota concern. It suffices to say that, so far as appears, both are corporations, and persons may be stockholders in two or more corporations without justifying the conclusion that the corporations are one, particularly where they are organized and conduct their business in different states. We do not discern any necessarily impeaching or suspicious circumstance in connection with these facts. It is claimed by appellant that the evidence discloses that the Dakota company was to receive 10 per cent profit on the cost of material and labor used in the state printing, and that the testimony of Bloom shows that he only figured on 10 per cent profit on the state work, and that this, in connection with the fact that he was to pay the additional sum of $250 per month, shows that if the journal company was the real party contracting with the state, or interested in it, it would be an unprofitable job on its face. The record on this is not quite clear, but we think it fairly warrants the conclusion that the journal company figured on a 10 per cent profit over and above what the total cost might be for securing the work done. This disposes of that point.

The next point is that the $7,000 payment made by the state to the journal company for printing between the 1st of January, 1913, and the trial of this proceeding, was turned over *in toto* to the Dakota company. This is fully and reasonably explained by Bloom. His expla-

nation is to the effect that while tabulations were kept of all the labor and material furnished by the Dakota company to the journal company in the execution of its contract with the state, and while strictly in accordance with the terms of the contract they should have, at stated periods, adjusted their financial affairs, that during the sixty days' session of the legislature, which session had not expired when this trial occurred, the plant and the men were worked to the limit, and that the adjustment or stating of accounts and settlements which should have taken place in the interim were deferred until the work was less pressing, and the parties had more time and a better opportunity to strike a balance, and that as the work done at the time of the receipt of the payment on the estimate amounting to $7,000 amounted to a greater sum than that, the entire payment was turned over to the Dakota company to apply on account, leaving settlement to be made in full at a later date. The fact that the printing thus far done was delivered to Bloom as a representative of the journal company, and by him turned over to the Dakota company *in toto,* is without material significance, particularly when we consider that, except as to an insignificant amount, all belonged in the first and second classes, which are not involved in this proceeding. It is shown that the Dakota company was actually engaged in doing work for other parties; that at the time of the trial it had done something like $5,000 worth of such work. Much emphasis is placed upon the fact that the negotiations between Bloom and the other incorporators of the Dakota company for the formation of such a corporation commenced very soon after the letting of the contract between the state and the journal company referred to. This does not strike us as casting suspicion upon the conduct of the parties, or indicating that they intended to evade the law. It is conceded that the journal company did not possess a plant in Bismarck, and that some arrangement had to be made whereby the first and second class work could be done in Bismarck, and their negotiations resulted in a feasible and practical method of securing the use of a plant and material with which to comply with the terms of the contract; and it was incumbent upon the journal company to make such provision before it became necessary for it to enter upon the execution of the contract, and before the legislature should convene, early in January. Negotiations would naturally take place with people who were in the printing business, or who

knew something about it; and unless Bloom desired to move the journal plant from Devils Lake to Bismarck, such arrangements were, of necessity, made with other parties.

It is again insisted that the plant in Bismarck is being operated and conducted for the benefit of the Dakota company. We cannot agree wholly with this. When parties enter into a contract it is presumed to be contemplated that the benefits will be mutual; otherwise one party or the other would decline to join. We have shown clearly what benefits were anticipated by the respective parties to this contract. The record, we think, shows that the journal company contemplated making at least a 10 per cent profit on the work over and above all expenditures; that the Dakota company contracted for a 10 per cent profit on the labor and material, and that the $250 per month might reimburse them for the use of machinery, type, the furnishing of power, floor space, and building, etc., none of which were covered by the 10 per cent feature. It is also urged that the fact of the payment of $250 per month during the entire period covered by the contract should receive great weight and be construed favorably to appellant. We think what we have said regarding the whole contract and the facts disclosed sufficiently answer this. We are not experts in the value of the use of printing machinery, type, the furnishing of power for presses, and the other machinery; and we cannot say that it is an unreasonable compensation, or even so unreasonable as to impeach the motives of the parties in entering upon such contract, and prove that it was merely a scheme to cover up a violation of law. It would seem that Bloom contemplated doing work under his contract with the state aggregating considerable more than $100,000. The proportions of the different classes are not disclosed. The advantage to the journal company from having an accessible plant during the legislative session may have been, and doubtless was, of great value. Certain it is that without it that company would have been powerless to perform, and, as Bloom testifies, it was up to him to procure a plant.

We think we have covered sufficiently the contentions of appellant as to the facts which he claims shed light upon the nature of the contract and the acts of the parties. We realize that, as to these considerations, the appellant had to rely upon the testimony adduced from hostile witnesses, but this does not relieve him from maintaining the burden of

proof in the case; and when the whole record is considered and due weight given to this fact, we are unable to reach the conclusion that it shows a violation or an evasion of the statute. The contract called for the furnishing of material and labor, and a plant, to the journal company, with which it might do the work contemplated by its contracts with the state. The evidence neither proves that the work was being done otherwise than under the terms of the contracts, or in disregard of their terms, or by the Dakota company. In a sense, of course, all hired work is done by the party hired, but the principal is the responsible party. We have not assumed to cover, in this opinion, all of the evidence submitted. We cannot do so. We have only referred to the most salient points and the most important specific contentions of the appellant, which he claims tend to impeach the acts of the journal company. While we might possibly infer that the parties contemplated that a portion, at least, of the third and fourth class printing is to be done at the plant in Bismarck, yet the positive testimony of Bloom is that the greater portion of it will be done in Devils Lake. The only circumstance indicating that the remaining portion may be done in Bismarck is the fact of this contract with the Dakota company and the improbability of its being given to other parties, and any conclusion that it is to be done here is purely a conclusion resting upon inference.

We may add, as a final consideration, that appellant in his argument, in effect, concedes that if the transaction between the journal company and the Dakota Company was in fact a lease it was lawful. We are unable to see what object the manager of the journal company might have in evading the law, or in turning the work over to the Dakota company to do, if he could hire the plant. Bloom, the manager of the journal company, owned only a one-thirtieth interest in the Dakota company, while he owned a controlling interest in the journal company. It follows that his profits to be realized from the work to be done by the Dakota company would be small as compared with like profits if done by the journal company. In view of the conditions, why should he not adopt the legal, rather than the illegal, method of accomplishing the end he had in view? Why should the court discredit respondents' theory and adopt appellant's view of the relation between these printing concerns, when all presumptions are in favor of legal, rather than illegal, transactions? And even if the proof was suscep-

tible of a construction which would render the transaction legal, or of the other, rendering it illegal, it would be the duty of the court, in case of grave doubt, to adopt the former.

We decide, without considering other questions which, by reason of our conclusion, become immaterial, that the judgment of the District Court must be affirmed.

TAUTE v. J. I. CASE THRESHING MACHINE COMPANY.

(141 N. W. 134.)

Contract — servant — agent — independent contractor.

1. A contract to the effect that "I agree to haul or run the F. T. rig, tender, and engine which is 12 miles north of Tolley, and separator which is 17 miles north of Tolley. I agree to furnish all help, fuel, and water to bring the same to Tolley, North Dakota. The J. I. Co. agrees to pay said K. (the signer of the instrument) the sum of thirty and $^{00}/_{100}$ dollars; said rig to be hauled or brought to Tolley on or before October 20, 1910. The said 22 horse-power engine is supposed to be in good running order. If any repairs is needed will be furnished by J. I. Co." *Held*, to state the contract of an independent contractor, and not the obligation of a servant or agent.

Trial court — findings — jury — liability — independent contractor.

2. Where an independent contractor undertakes to transport a threshing-machine engine along a country road, and at the time that the engine is delivered to him there is a crack or defect in the front end door of the fire box, and, after the engine has passed a point upon the highway, a fire is seen to start from a distance of some 4 or 5 feet from the same, but there is no evidence whatever that any fire escaped through the crack in the door, but, on the other hand, it is shown that the same was plastered with mud during the whole of the

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Note.—The authorities on the general question who are independent contractors are collated in extensive notes in 65 L.R.A. 445, and 17 L.R.A.(N.S.) 371.

For a collection of the authorities on the employer's liability for acts of an independent contractor in setting out fire, see notes in 65 L.R.A. 654, 853; 17 L.R.A. (N.S.) 788; and 38 L.R.A.(N.S.) 175. See also note in 76 Am. St. Rep. 396, 420. And upon the liability where work is dangerous unless certain precautions are observed, see note in 65 L.R.A. 833.

For the general rule as to the absence of liability of an employer for acts of an independent contractor, see notes in 65 L.R.A. 622, and 14 L.R.A. 828.

journey so as to prevent the escape of sparks therefrom. The supreme court will not set aside the findings of the trial court who acted without a jury that no liability can be imputed to the owner of the engine on the theory that he has allowed an independent contractor to do that which is, in its nature, intrinsically dangerous.

Opinion filed April 8, 1913.

Appeal from the County Court of Renville County; *Percy S. Crewe,* J.

Action to recover damages for loss of property alleged to have been destroyed by fire claimed to have been started by sparks from defendant's threshing-engine while said engine was being moved by a third party under a contract. Judgment for Defendant. Plaintiff Appeals. Affirmed.

On October 18, 1910, the defendant and respondent engaged one R. L. Kerr to move a threshing engine and separator a distance of some 12 to 17 miles, to Tolley, North Dakota. The contract was in writing, and was as follows: "I agree to haul or run the Frank Tudall rig, tender and engine, is 12 miles north of Tolley and separator is 17 miles north of Tolley. I agree to furnish all help, fuel, and water to bring the same to Tolley, North Dakota. The J. I. Case T. M. Co. agree to pay said R. L. Kerr the sum of $30, said rig to be hauled or brought to Tolley, North Dakota on or before October 20, 1910. The said 22 horse-power Buffalo-Pitts engine is supposed to be in good running order, and if any repairs are needed will be furnished by J. I. Case Company. (Signed) R. L. Kerr." The said Kerr moved the machinery to Tolley under said contract, hiring a man and team and an engineer to assist him, and, in moving such engine and machinery and for the purpose of accomplishing the same, he fired up the engine. The defendant did not in any way assist in the transaction, and gave no directions whatsoever in connection therewith. The employees of Kerr relied upon and upon him alone for their instructions. While the engine was being moved to Tolley, a fire started near the road along which the same was being moved, which destroyed the plaintiff's hay, for the loss of which this action is brought. This fire was not directly traced to the engine. One witness testifies that he did not see it start; that he first saw it about 4 feet from the wagon track. He was doing

team work, driving the water and straw tanks, and the fire was behind the engine. He could not swear whether the fire started from the engine or not. Kerr testified that he first saw the fire 5 or 6 rods behind the engine and about 2 rods from the road,—started about a rod from the road; might be less; he wondered how it had started. Did not know; could not say whether it started from the fire box or smokestack; he did not know that it started from the engine. The engineer testified that there was a crack in the door; that it blew out smoke; that he fixed it with mud; that the mud was there until he got to the river, and then he filled it with mud again; that there was mud there when he got to Tolley; that the engine was in proper shape to draw itself. There is, in fact, no testimony whatever as to the condition of the smokestack of the engine; that any sparks came therefrom, or that sparks at any time escaped from the crack in the door. There is testimony, however, that a year before, and in the fall of 1909, the engine was in bad condition. It was then an engine about fourteen or fifteen years old. The engineer then in charge of it testifies that he had to fix up the firebox during the season of 1909, and had to get Alabaster to put in there to keep the fire from coming out; also, that the front door was cracked. The crack, he judged, was "about ¼ inch wide, and the fire would keep coming out there right along. The door was on the front end of the firebox, about 3 feet from the ground. By reason of these defects as to the fire department of the engine, fires were started by the engine that fall. It would be pretty hard to say what the fires started from, there were so many places that leaked." The witness further testified that he set four fires with the engine that he knew of, and that the door or defective parts could have been fixed so that the fire could not have got out if there had been a new door put on. The witness, however, further testifies that he left the engine in the fall in better condition than when he got it, with the exception of the crack in the front door, though he testified that "it should be fixed up if you ran it a while." The engine was not used during 1910 until moved at the time of the fire in question, and on account of which this suit was brought. Prior to moving the engine in the fall of 1910, Kerr's engineer testified that some repairs were sent to him by the agent of the defendant, and that he put on a steam gauge, took out several loose joints, and put in a grate, and a tin pan in the smokestack. He said that some smoke came out

of the fire box when he was facing the wind, and that there was a crack in the door that blew out smoke. He, however, testified that he packed this crack with mud; "that this mud was on the front door when he pulled the engine into Tolley; that the engine was in shape to draw itself; that the engine was drawing all right when you were running against the wind, and your firebox was not packed too full of straw." The case was tried before the court without a jury, and the county judge found that the defendant was not guilty of any negligence, and did no act which contributed in any manner to the starting of the fire which destroyed the property of the plaintiff. He accordingly rendered judgment against the plaintiff for the dismissal of the action, with costs and disbursements to be taxed against him. From this judgment the plaintiff appeals.

Grace & Bryans, for appellant.

Kerr was not an independent contractor. He was a mere servant of the defendant. 16 Am. & Eng. Enc. Law, 187; Jensen v. Barbour, 15 Mont. 582, 39 Pac. 906; Ruehl v. Lidgerwood Rural Teleph. Co. 23 N. D. 6, — L.R.A.(N.S.) —, 135 N. W. 793; Whitney v. Clifford, 46 Wis. 138, 32 Am. Rep. 703, 49 N. W. 835; Robbins v. Chicago, 4 Wall. 675, 18 L. ed. 431; Ellis v. Sheffield Gas Consumers' Co. 2 El. & Bl. 769, 2 C. L. R. 249, 23 L. J. Q. B. N. S. 42, 18 Jur. 146, 2 Week. Rep. 19, 19 Eng. Rul. Cas. 180; 25 Cyc. 1559, and cases cited; 26 Cyc. 159, 1573.

Bosard & Twiford, for respondent.

If there was any negligence which caused damage to plaintiff, it was that of an independent contractor with defendant, and defendant is not liable. 1 Thomp. Neg. § 621, and cases cited in note 7, p. 569; Leavitt v. Bangor & A. R. Co. 89 Me. 509, 36 L.R.A. 382, 36 Atl. 998, 1 Am. Neg. Rep. 605.

Kerr was employed by defendant, as an independent contractor to do a lawful piece of work not dangerous, and over which defendant had no supervision. City & Suburban R. Co. v. Moores, 80 Md. 348, 45 Am. St. Rep. 345, 30 Atl. 643; St. Louis, I. M. & S. R. Co. v. Yonly, 9 L.R.A. 604, see note; Salliotte v. King Bridge Co. 65 L.R.A. 620, 58 C. C. A. 466, 122 Fed. 378; 1 Shearm. & Redf. Neg. 5th ed. §§ 164–167.

The injury did not result from the work itself. Ruehl v. Lidgerwood Rural Teleph. Co. 23 N. D. 6, — L.R.A.(N.S.) —, 135 N. W. 793; Davie v. Levy, 39 La. Ann. 551, 4 Am. St. Rep. 225, 2 So. 395; 1 Thomp. Neg. § 639.

BRUCE, J. (after stating the facts as above). There are but two questions for decision in this case: 1. Was the witness Kerr, who moved the machinery, an independent contractor? 2. Even if an independent contractor, was the moving of the engine in its then condition so intrinsically dangerous a transaction or guilty of such negligence in relation thereto that he would be liable for the losses occasioned thereby?

We are satisfied that the witness Kerr, who moved the engine, was an independent contractor. There was no right of control reserved by the defendant. Kerr hired and controlled his own men, and was free to haul or run the engine as he saw fit, and at any time and in any manner, provided that the work was done before October 20. 1 Thomp. Neg. §§ 622, 639; 26 Cyc. 1546; Leavitt v. Bangor & A. R. Co. 89 Me. 509, 36 L.R.A. 382, 36 Atl. 998, 1 Am. Neg. Rep. 605; Note to 65 L.R.A. 445; Shearm. & Redf. Neg. 5th ed. § 164.

Counsel for appellant, we know, relies upon the decision of this court in Ruehl v. Lidgerwood Rural Teleph. Co. 23 N. D. 6, — L.R.A. (N.S.) —, 135 N. W. 793, as tending to support a contrary rule. We do not, however, so interpret the opinion in that case. In it we did not place our decision upon the proposition that the man who dug the post holes might not possibly have been an independent contractor, but upon the theory that the telephone company had contracted to place a telephone in the house, and that a part of that undertaking was the implied contract to do the work in a reasonably safe way and with the exercise of such ordinary care that the occupants of the house would not be in danger. The liability in such cases would be the same whether the work was done by a servant or agent, or by an independent contractor. In the case at bar, however, the injury was not done to the second party to the contract, nor was the action brought by him. The action is based upon an injury done to an outsider merely, and the liability, if any, must be based upon a duty and obligation to that outsider which is not contractual in its origin.

But appellant insists that, under the holding in the Ruehl Case, a liability could be based upon the theory that the injury was occasioned by the subject of the contract, and that where the negligence or defect which occasioned the injury results directly from the acts which the contractor agrees, and is authorized, to do, the person who employs a contractor and authorizes him to do such acts is liable to the injured party. He cites in support of this proposition both the cases of Ruehl v. Lidgerwood Rural Teleph. Co. supra, and the cases of Whitney v. Clifford, 46 Wis. 138, 32 Am. Rep. 703, 49 N. W. 835; Robbins v. Chicago, 4 Wall. 675, 18 L. ed. 431; Ellis v. Sheffield Gas Consumers' Co. 2 El. & Bl. 769, 2 C. L. R. 249, 23 L. J. Q. B. N. S. 42, 18 Jur. 146, 2 Week. Rep. 19, 19 Eng. Rul. Cas. 180. The rule is, in the main, correctly stated by him; and it is no doubt the law that an owner of property can be held liable in damages in certain cases even where the work is intrusted to an independent contractor, and where the work ordered to be done or the structure ordered to be erected is, in itself, intrinsically dangerous or a nuisance. The origin and reason of this rule is the duty of due consideration which one in a civilized community owes to his fellows and to the public, and that such a duty precludes the ordering of that which, if done, will be inherently dangerous. These considerations are hardly applicable to the case at bar. It can hardly be said as a matter of law that the machine was a nuisance, or that the moving of it was an essentially dangerous transaction. City & Suburban R. Co. v. Moores, 80 Md. 348, 45 Am. St. Rep. 345, 30 Atl. 643; St. Louis, I. M. & S. R. Co. v. Yonley, 53 Ark. 503, 9 L.R.A. 604, 13 S. W. 333, 14 S. W. 800. Under the facts disclosed by the record, it was for the trial judge, who acted as a jury in this case, to decide these questions. It may also be the rule, as appellant suggests, that where a person contracts with an independent contractor for the performance of that which, in its nature, is dangerous unless due care is taken in the transaction, the principal will be liable for injuries which result from a lack of such care. Robbins v. Chicago, 4 Wall. 675, 18 L. ed. 431. The fact of this danger, however, is one primarily for the jury, and not for the court, or, where a jury is waived, for the trial judge. In such cases, also, there must be some measure of proof that the lack of care necessary to overcome the dangerous condition of the instrument or the dangerous character of

the work was a proximate cause of the injury. Whether the evidence would justify such an inference in this case was primarily a question for the trial judge to determine, and his finding in this respect must have the same effect and weight as the verdict of a jury. There is no such preponderance of evidence as would justify us in overruling his decision. There is no positive testimony, in fact, that any sparks came from the crack in the door at any time, or that the crack in the door had anything to do with the conflagration. The evidence, indeed, as far as it goes, shows that the crack was plastered with mud during the whole of the journey. There is, in fact, no positive evidence whatever as to the cause of the fire. There is, it is true, evidence that a year or so before the accident in controversy the engine occasioned several other fires, but as an offset to this there is evidence that at the end of the season the engine was in better condition than during the same, and that before the engine was moved the crack in the door was plastered up, and that new grates were placed in the fire box. There is, in fact, no direct testimony that the crack in the door, which is the only defect concerning which there is any positive evidence, had anything to do with the conflagration; and it is a matter of common knowledge that prairie fires are not only occasioned by defective machines, but by carelessness in operation, the dropping of matches, the scattering of ashes, and the pulling out of burning straw. It may possibly be that if the suit had been brought against the contractor the burden would have been upon him to afford some explanation for the fire under the peculiar circumstances of the case. There could hardly be such a burden, however, upon the defendant in this case. It may also be that if the finding of the trial court had been other than it was, we would not have interfered with it. We must, at any rate, give to the finding in this case the same weight and effect as if it had been the verdict of a jury.

The judgment of the County Court is affirmed.

STATE v. KAHELLEK.

(140 N. W. 1135.)

Conviction — common nuisance — appeal — cross-examination — restriction — error.

Opinion filed April 9, 1913.

Appeal from a judgment and order of the County Court having increased jurisdiction of Ward County; *Davis,* J.

Reversed.

Blaisdell, Murphy, & Blaisdell, for appellant.

In criminal cases, the defendant should not be restricted in a fair and reasonable attempt, on cross-examination, to show the strife and hostility of the witnesses against the defendant, as touching the credibility of such witnesses. 2 Wigmore, Ev. §§ 879–1005; State v. Kent (State v. Pancoast) 5 N. D. 516, 35 L.R.A. 518, 67 N. W. 753; State v. Malmberg, 14 N. D. 523, 105 N. W. 614; State v. Hazlett, 14 N. D. 490, 105 N. W. 617; State v. Hakon, 21 N. D. 133, 129 N. W. 234.

The names of all witnesses known to the state's attorney at the time of the filing of the information should be indorsed thereon. State v. Albertson, 20 N. D. 512, 128 N. W. 1122; State v. Kent (State v. Pancoast) 5 N. D. 516, 35 L.R.A. 518, 67 N. W. 1052; State v. Pierce, 22 N. D. 358, 133 N. W. 991.

Remarks by the trial court, expressing or indicating any opinion as to the facts, the condition of the witnesses as to be sober or otherwise, is improper. Territory v. O'Hare, 1 N. D. 30, 44 N. W. 1003; State v. Barry, 11 N. D. 428, 92 N. W. 809; State v. Noah, 20 N. D. 281, 124 N. W. 1122; State v. Peltier, 21 N. D. 188, 129 N. W. 451.

The state appears by *Andrew Miller,* Attorney General, *C. L. Young,* Assistant Attorney General, and *Dudley L. Nash,* State's Attorney.

And admits reversible error by the trial court in restricting improperly the cross-examination of witnesses for the state.

Per Curiam. This is an appeal from a judgment convicting the de-

fendant of the crime of keeping and maintaining a common nuisance in the county of Ward, between the 1st day of January, 1910, and the 24th day of July, 1911; and from an order denying defendant's motion for a new trial. Numerous errors are assigned as a basis for a reversal. The state appears and admits reversible error by the trial court in improperly restricting the cross-examination of two witnesses. Cross-examination of these witnesses was not permitted to show hostility toward the defendant or their state of mind regarding him. This class of cross-examination has been repeatedly held proper in this state, and we think the assignment of the appellant on this point is sustained thereby. See State v. Hakon, 21 N. D. 133, 129 N. W. 234; State v. Hazlett, 14 N. D. 490, 105 N. W. 617; State v. Malmberg, 14 N. D. 523, 105 N. W. 614; State v. Kent (State v. Pancoast) 5 N. D. 516, 35 L.R.A. 518, 67 N. W. 753.

The judgment and order of the County Court of Ward County are reversed.

HINTZ v. WAGNER.

(140 N. W. 729.)

Expert testimony — subjects — litigations.

1. Testimony of experts is admissible in many cases, because the subject of the litigation relates to or involves matters on which people in general are incompetent to form or offer opinions, and because the expert has made a special study of the subject.

Medical expert — examination — qualifications — case of injury — opinion — witness.

2. As a general, though not inflexible, rule, a medical expert who has never treated an injured party, and only makes an examination many months after the injury was inflicted, and then solely for the purpose of qualifying him as an expert witness, may not give his opinion as to the cause of the present condition of the party, the extent and effect of the injuries, and their duration, when such opinion is based largely upon a history of the case given by the injured party to the expert for the purpose of qualifying him as an expert witness.

Note.—For a note on the admissibility of the opinions of medical experts, see 59 Am. Dec. 180. And as to opinion evidence of physician as to personal injury, see note in 10 Am. St. Rep. 63.

Injuries — assault — expert testimony — diagnosis — opinion — personal examination — hearsay.

3. This action is for injuries occasioned by an assault alleged to have been committed by defendant upon plaintiff. The only expert testimony was given by a physician who had never been called to attend plaintiff or prescribe for her, but who examined her during the progress of the trial, about eighteen months after the infliction of the injury, solely for the purpose of qualifying him as an expert witness. There were no outward evidences of the injury, and he testified that he formed his diagnosis upon the strength of what he found, what he made her tell him, her answers to his inquiries, what she said about the changes from time to time in the past, and her history of her condition during the time between the litigation and the trial. *Held* that, under the circumstances of this case, and such opinion being largely based upon hearsay and statements made out of court, not under oath, and when every temptation and opportunity existed for exaggeration and misrepresentation, such evidence was incompetent, and its admission highly prejudicial to the defendant.

Medical expert — opinion evidence — history of case.

4. Testimony of a medical expert should, in general, be confined to the result of his actual investigations, and, when he has never been called to attend or prescribe for the party, should be limited to the conditions he finds on the examination, and to his opinion based thereon.

Witness — subject — deception — evidence — jury.

5. Testimony of a medical expert that the plaintiff, whom he examined to qualify him as a witness, could not deceive him as to her condition, was improperly received for the reason that that question was for the jury.

Injury — services — value — damages.

6. Evidence was admitted that plaintiff had been unable to perform her household duties since the infliction of the injury, and that it became necessary for a young daughter to aid her in doing her housework. No definite value was fixed on the services of such daughter, and the condition of the evidence on the subject rendered it possible for the jury to include the value of her services in the verdict. *Held*, that it was error to admit such evidence as a basis for damages.

Testimony — witness — argument — jury.

7. It was error to permit the medical expert to give testimony in the nature of an argument to the jury in favor of the plaintiff.

Evidence — witness — error.

8. The error, in admitting the testimony of the medical expert, based upon the history of the case, etc., given by plaintiff in this case, was not cured by other evidence on the same subject.

Reversal — technical error — substance — issues — substantial rights.

9. A reversal on technical error is a reversal on error not going to the substance of the issues or to the substantial rights of a party.

Testimony of expert — injury — recovery — amount — jury — verdict.

10. In this case the testimony of the expert to some extent went to the fact of the injury, but very largely to the amount of recovery; and this court cannot determine that, had such incompetent evidence been excluded, the jury would have arrived at the verdict which it found. Such error was, therefore, not a technical error, but went to one of the vital elements of the issues.

Fair trial — jury — verdict — justice.

11. Every person is entitled to a legal trial, and, in a jury case, to a verdict which has been reached by a fair submission of the evidence and the law of the case to the jury; and when this has not been done, this court cannot say that justice has been done, but must hold that the verdict has been reached by illegal means.

Technical errors — criminal appeal act — policy of the law.

12. In answer to respondent's contention that the errors presented in this record are only technically errors, and his request that the court follow certain provisions of the 1907 English criminal appeal act, and of a bill recently passed by the national House of Representatives, attention is called to the fact that they are but expressions of the policy of the law of this state and of this court for many years.

On Application for Rehearing.

Appeal — objections.

13. An objection properly interposed to a general question as to the diagnosis formed on an examination of a party, which objection is based upon the ground that, in laying a foundation for the general question, it was disclosed that the diagnosis was based in part, at least, upon hearsay and other evidence incompetent as a foundation, covers all subsequent questions on the same subject, propounded to the same witness, and having for their object the eliciting of answers necessarily included in the answer to the main question.

Opinion filed February 18, 1913. On petition for rehearing April 9, 1913.

Appeal from a judgment and order of the District Court of Wells County; *Burke,* and *Coffey,* JJ.

Reversed.

John O. Hanchett, for appellant.

If the plaintiff's minor daughters had worked out and earned wages,

such wages would have belonged, not to her, but to Carl Hintz, their father, and are therefore not a proper element of damages in this case. Rev. Codes 1905, § 4092; Am. Dig. Century ed. cols. 2471, 2480, §§ 4466, 4475; Hanson v. Boyd, 161 U. S. 397, 40 L. ed. 746, 16 Sup. Ct. Rep. 571; Miller v. Keokuk & D. M. R. Co. 63 Iowa, 680, 16 N. W. 567; Mackey v. Olssen, 12 Or. 429, 8 Pac. 357; Hazard Powder Co. v. Volger, 7 C. C. A. 130, 12 U. S. App. 665, 58 Fed. 152.

The plaintiff was permitted on her direct examination, over objection, to testify that her condition at the time of the trial was the result of the assault and battery upon her, by defendant. Such was error, since it was a mere opinion or conclusion, and, if proper at all, was a matter for expert testimony, or a question for the jury. Kline v. Kansas City, St. J. & C. B. R. Co. 50 Iowa, 659; People v. Hare, 57 Mich. 505, 24 N. W. 843; Yost v. Conroy, 92 Ind. 471, 47 Am. Rep. 156; Smith v. Northen P. R. Co. 3 N. D. 561, 58 N. W. 345.

A physician who has made an examination of a patient for treatment at the time, or within a short time after the injury, may testify as to a diagnosis or opinion based on such examination. But statements of past suffering or symptoms are excluded. 1 Greenl. Ev. 16th ed. p. 255; Atchison, T. & S. F. R. Co. v. Frazier, 27 Kan. 463.

A physician will not be permitted to give his opinion based partly upon his examination, and, what the party told him of the *past history* of the case. Kreuziger v. Chicago & N. W. R. Co. 73 Wis. 158, 40 N. W. 657; Rowell v. Lowell, 11 Gray, 420.

A physician cannot testify or give his *opinion* as an expert, as to whether the plaintiff was a *strong woman* before the injury. Such evidence is wholly incompetent. Moore v. Chicago, B. & Q. R. Co. 65 Iowa, 505, 54 Am. Rep. 26, 22 N. W. 650; People v. Hare, 57 Mich. 505, 24 N. W. 843; Carter v. Boehm, 1 Smith, Lead. Cas. 286, see note; Ellingwood v. Bragg, 52 N. H. 488.

Upon subjects of general knowledge, with which juries are presumed to be familiar, witnesses must testify as to facts alone, and not as experts. Jones v. Tucker, 41 N. H. 547; Cole v. Lake Shore & M. S. R. Co. 95 Mich. 77, 54 N. W. 638; Hamer v. First Nat. Bank, 9 Utah, 215, 33 Pac. 941; Carpenter v. Calvert, 83 Ill. 70.

Bessessen & Berry, for respondent.

It has been repeatedly held that objections to evidence not made in

the court below cannot be urged on appeal. Decen. Dig. & Key Number Series, Appeal & Error, § 181.

Findings of fact by the trial court are conclusive on appeal. Decen. Dig. Appeal & Error, 1008; Warren v. Nix, 97 Ark. 374, 135 S. W. 896; Bayle v. Morris, — Tex. Civ. App. —, 134 S. W. 767.

If there is any legal evidence touching the issues decided, the findings of the trial court will not be disturbed. See Hardison v. Davis, 131 Cal. 635, 63 Pac. 1005; Yore v. Seitz, — Cal. —, 57 Pac. 886; Wheeler & W. Mfg. Co. v. Barrett, 172 Ill. 610, 50 N. E. 325; Spencer v. Berns, 114 Iowa, 126, 86 N. W. 209; Martin v. Walker, 84 Minn. 8, 86 N. W. 467; Inge v. McCreery, 60 App. Div. 557, 69 N. Y. Supp. 1052; Deegan v. Kilpatrick, 54 App. Div. 371, 66 N. Y. Supp. 628; Neely v. Grayson County Nat. Bank, 25 Tex. Civ. App. 513, 61 S. W. 559; Abeel v. Tasker, — Tex. Civ. App. —, 47 S. W. 738.

If findings are supported by competent evidence, they will not be disturbed. Spitler v. Kaeding, 133 Cal. 500, 65 Pac. 1040; Herd v. Tuohy, 133 Cal. 55, 65 Pac. 139; Sonoma County v. Hall, 129 Cal. 659, 62 Pac. 213; Baird v. New York, 96 N. Y. 567; Kornder v. Kings County Elev. R. Co. 61 App. Div. 439, 70 N. Y. Supp. 708; Jena v. Third Ave. R. Co. 50 App. Div. 424, 64 N. Y. Supp. 88; Cauhape v. Security Sav. Bank, 118 Cal. 82, 50 Pac. 310; Kelly v. Brown, — Cal. —, 8 Pac. 38; De Celis v. Porter, 65 Cal. 3, 2 Pac. 257, 3 Pac. 120; Hoffeld v. Buffalo, 130 N. Y. 387, 29 N. E. 747; Deuterman v. Gainsborg, 9 App. Div. 151, 41 N. Y. Supp. 185; The City of New York (Alexandre v. Machan) 147 U. S. 72, 37 L. ed. 84, 13 Sup. Ct. Rep. 211; Jeffries v. Mutual L. Ins. Co. 110 U. S. 305, 28 L. ed. 156, 4 Sup. Ct. Rep. 8; Hafelfinger v. Perry, — Colo. —, 121 Pac. 1021; State ex rel. Oolitic Stone Co. v. Central States Bridge Co. 49 Ind. App. 544, 97 N. E. 803; Benbow v. The James John, 61 Or. 153, 121 Pac. 899; Rauchwanger v. Katzin, 82 N. J. L. 339, 82 Atl. 510; Hillman v. Donaldson, 67 Wash. 412, 121 Pac. 866; Hubbard v. Ferry, 141 Wis. 17, 135 Am. St. Rep. 27, 123 N. W. 142.

On evidence fairly justifying either of two inferences, the decision of the trial court must control. Kola Lumber Co. v. Stoughton Wagon Co. 143 Wis. 329, 127 N. W. 974; West Virginia Northern R. Co. v. United States, 67 C. C. A. 220, 134 Fed. 198; Dooley v. Pease, 180 U. S. 126, 45 L. ed. 457, 21 Sup. Ct. Rep. 329, 12 Am. Crim. Rep.

408; McLeod v. Hunter, 49 App. Div. 131, 63 N. Y. Supp. 153; Holmvig v. Dakota County, 90 Neb. 576, 134 N. W. 166; Brogna v. Brogna, 67 Wash. 687, 122 Pac. 1; Schweikert v. John R. Davis Lumber Co. 147 Wis. 242, 133 N. W. 136; Howe v. Stratton, 107 Ill. App. 281.

The burden is on the defendant to show that the greater weight of the evidence is against the findings objected to. Lee v. Dwyer, 20 S. D. 464, 107 N. W. 674.

A married woman has such an interest in her working capacity as will enable her to recover for its impairment. See Powell v. Augusta & S. R. Co. 77 Ga. 192, 3 S. E. 757; Hamilton v. Great Falls Street R. Co. 17 Mont. 334, 42 Pac. 860, 43 Pac. 713; Harmon v. Old Colony R. Co. 165 Mass. 100, 30 L.R.A. 658, 52 Am. St. Rep. 499, 42 N. E. 505; Colorado Springs & I. R. Co. v. Nichols, 41 Colo. 272, 20 L.R.A. (N.S.) 215, 92 Pac. 691; Elijah v. Cowling, 49 Ind. App. 515, 97 N. E. 551; Wrightsville & T. R. Co. v. Vaughan, 9 Ga. App. 371, 71 S. E. 691; Metropolitan Street R. Co. v. Johnson, 90 Ga. 500, 16 S. E. 49. See Lehman v. Amsterdam Coffee Co. 146 Wis. 213, 131 N. W. 362; Skow v. Green Bay & W. R. Co. 141 Wis. 21, 123 N. W. 138; Baxter v. Chicago & N. W. R. Co. 104 Wis. 307, 80 N. W. 644; American Mfg. Co. v. Bigelow, 110 C. C. A. 77, 188 Fed. 34; Smith v. Hoctor, 107 N. Y. Supp. 33; Chicago, R. I. & P. R. Co. v. Batsel, 100 Ark. 526, 140 S. W. 726.

It has been held that an appeal may be withdrawn, after part of the damages found by the jury is permitted by the plaintiff, and that the defendant thereafter proceeds at his own risk, as to costs. Theavenought v. Hardeman, 4 Yerg. 565.

Costs can only be awarded when expressly authorized. Casseday v. Robertson, 19 N. D. 574, 125 N. W. 1045; Whitney v. Akin, 19 N. D. 638, 125 N. W. 470; Engholm v. Ekrem, 18 N. D. 185, 119 N. W. 35; Elfring v. New Birdsall Co. 17 S. D. 350, 96 N. W. 703; Bathgate v. Irvine, 126 Cal. 135, 77 Am. St. Rep. 158, 58 Pac. 442; Baltimore & O. R. Co. v. Pittsburg, C. & St. L. R. Co. 1 Ohio C. D. 60; Summerhill v. Darrow, 94 Tex. 71, 57 S. W. 942; See also Andresen v. Upham Mfg. Co. 120 Wis. 561, 98 N. W. 518; Texas & P. R. Co. v. Davis, — Tex. Civ. App. —, 66 S. W. 598; Freeman v. Fuller, — Tex. Civ. App. —, 127 S. W. 1194; Ami Co. v. Tide Lumber Co. 51 Wash. 171,

98 Pac. 380; McKeown v. Dyniewicz, 83 Ill. App. 509; Clark v. McDowell, 58 Neb. 593, 79 N. W. 158; Toledo, St. L. & W. R. Co. v. Stevenson, 122 Ill. App. 654.

A party cannot object to evidence of a fact when he permits the same fact to be testified to without objection. Bailey v. Walton, 24 S. D. 119, 123 N. W. 701; Fowler v. Iowa Land Co. 18 S. D. 131, 99 N. W. 1095; Peters v. Kiriakedes, 27 S. D. 371, 131 N. W. 316; Robinson v. Omaha, 84 Neb. 642, 121 N. W. 969; Olmstead v. Red Cloud, 86 Neb. 528, 125 N. W. 1101; Beard v. First Nat. Bank, 41 Minn. 153, 43 N. W. 7; Spoonick v. Backus-Brooks Co. 89 Minn. 354, 94 N. W. 1079; Ashley v. Sioux City, — Iowa, —, 93 N. W. 303; Graham v. Mattoon City R. Co. 234 Ill. 483, 84 N. E. 1070, 14 Ann. Cas. 853; Hunt v. Dubuque, 96 Iowa, 314, 65 N. W. 319; Boston Woven Hose & Rubber Co. v. Kendall, 178 Mass. 232, 51 L.R.A. 781, 86 Am. St. Rep. 478, 59 N. E. 657, 9 Am. Neg. Rep. 496; People v. Chacon, 102 N. Y. 669, 6 N. E. 303; Butts County v. Hixon, 135 Ga. 26, 68 S. E. 786; St. Louis Southwestern R. Co. v. Huey, — Tex. Civ. App. —, 130 S. W. 1017; Anderson v. Minneapolis, St. P. & S. Ste. M. R. Co. 18 N. D. 462, 123 N. W. 281; Doyle v. Eschen, 5 Cal. App. 55, 89 Pac. 836; Daughtry v. Savannah & S. R. Co. 1 Ga. App. 393, 58 S. E. 230; Erickson v. Sophy, 10 S. D. 71, 71 N. W. 758; Indianapolis Street R. Co. v. Taylor, 39 Ind. App. 592, 80 N. E. 436; Knuckey v. Butte Electric R. Co. 45 Mont. 106, 122 Pac. 280; St. Louis & S. F. R. Co. v. Duke, 112 C. C. A. 564, 192 Fed. 306; Neff v. Williamson, 154 Ala. 329, 46 So. 238; Hindle v. Healy, 204 Mass. 48, 90 N. E. 511; Pace v. Louisville & N. R. Co. 166 Ala. 519, 52 So. 52; Poppenhusen v. Poppenhusen, 149 App. Div. 307, 133 N. Y. Supp. 887; Waters-Pierce Oil Co. v. Snell, 47 Tex. Civ. App. 413, 106 S. W. 170; Iowa Homestead Co. v. Duncombe, 51 Iowa, 525, 1 N. W. 725; Edwards v. White, — Tex. Civ. App. —, 120 S. W. 914; Vann v. Denson, 56 Tex. Civ. App. 220, 120 S. W. 1020; New York P. & N. R. Co. v. Wilson, 109 Va. 754, 64 S. E. 1060; Los Angeles County v. Winans, 13 Cal. App. 257, 109 Pac. 650; Atlanta & W. P. R. Co. v. Haralson, 133 Ga. 231, 65 S. E. 437, 21 Am. Neg. Rep. 597; Mutual F. Ins. Co. v. Ritter, 113 Md. 163, 77 Atl. 388; Missouri K. & T. R. Co. v. Gilbert, — Tex. Civ. App. —, 130 S. W. 1037; Small v. Rush, — Tex. Civ. App. —, 132 S. W. 874; Buswell v. O. W. Kerr Co.

112 Minn. 388, 128 N. W. 459, 21 Ann. Cas. 837; Wilder v. Great Western Cereal Co. 134 Iowa, 451, 109 N. W. 789; Raymond v. Glover, 122 Cal. 471, 55 Pac. 398; Medearis v. Anchor Mut. F. Ins. Co. 104 Iowa, 88, 65 Am. St. Rep. 428, 73 N. W. 495; Missouri P. R. Co. v. Fox, 60 Neb. 531, 83 N. W. 744, 8 Am. Neg. Rep. 463.

The testimony of the physician was limited to his opinion or diagnosis based on his medical examination only. In any event, the objection is without merit, because of failure to object properly. Bailey v. Walton, 24 S. D. 119, 123 N. W. 701; Fowler v. Iowa Land Co. 18 S. D. 131, 99 N. W. 1095; Robinson v. Omaha, 84 Neb. 642, 121 N. W. 969; Peters v. Kiriakedes, 27 S. D. 371, 131 N. W. 316; Olmstead v. Red Cloud, 86 Neb. 528, 125 N. W. 1101; Beard v. First Nat. Bank, 41 Minn. 153, 43 N. W. 7; Spoonick v. Backus-Brooks Co. 89 Minn. 354, 94 N. W. 1079; Ashley v. Sioux City, — Iowa, —, 93 N. W 303; Wheelock v. Godfrey, — Cal. —, 35 Pac. 317; Graham v. Mattoon City R. Co. 234 Ill. 483, 84 N. E. 1070, 14 Ann. Cas. 853; Hunt v. Dubuque, 96 Iowa, 314, 65 N. W. 319; Boston Woven Hose & Rubber Co. v. Kendall, 178 Mass. 232, 51 L.R.A. 781, 86 Am. St. Rep. 478, 59 N. E. 657, 9 Am. Neg. Rep. 496; People v. Chacon, 102 N. Y. 669, 6 N. E. 303; Butts County v. Hixon, 135 Ga. 26, 68 S. E. 786; St. Louis Southwestern R. Co. v. Huey, — Tex. Civ. App. —, 130 S. W. 1017; Anderson v. Minneapolis, St. P. & S. Ste. M. R. Co. 18 N. D. 462, 123 N. W. 281.

There is no error in permitting a witness to testify as to undisputed facts. Hilleboe v. Warner, 17 N. D. 594, 118 N. W. 1047; Hedderich v. Hedderich, 18 N. D. 488, 123 N. W. 276; DeVos v. Caplan, 165 Mich. 77, 130 N. W. 328; Erp v. Raywood Canal & Mill. Co. — Tex. Civ. App. —, 130 S. W. 897; Central of Georgia R. Co. v. Butler Marble & Granite Co. 8 Ga. App. 1, 68 S. E. 775.

The opinion of a physician is necessarily formed in part on the statements of his patient, describing conditions and symptoms, and causes which led to the injury. Such opinion is clearly competent as coming from an expert. Barber v. Merriam, 11 Allen, 322; 5 Enc. Ev. 606, 612, 618; Jones, Ev. pp. 436, 472, § 375; Kansas City, Ft. S. & M. R. Co. v. Stoner, 2 C. C. A. 437, 10 U. S. App. 209, 51 Fed. 649; Consolidated Traction Co. v. Lambertson, 59 N. J. L. 297, 36 Atl. 100; Denver & R. G. R. Co. v. Roller, 49 L.R.A. 77, 41 C. C. A. 22,

100 Fed. 738; Tisdale v. Delaware & H. Canal Co. 4 N. Y. S. R. 312; Louisville, N. A. & C. R. Co. v. Falvey, 104 Ind. 409, 3 N. E. 389, 4 N. E. 908; Corin v. Fitchburg & L. Street R. Co. 181 Mass. 202, 92 Am. St. Rep. 408, 63 N. E. 355.

The admission of incompetent or irrelevant evidence over objection is not prejudicial error where there is in the record undisputed evidence not objected to, on the same issue. Erp v. Raywood Canal & Mill. Co. — Tex. Civ. App. —, 130 S. W. 897; Central of Georgia R. Co. v. Butler Marble & Granite Co. 8 Ga. App. 1, 68 S. E. 775; DeVos v. Caplan, 165 Mich. 77, 130 N. W. 328; Hedderich v. Hedderich, 18 N. D. 488, 123 N. W. 276.

The statement of one or more specific grounds of objection to evidence, is a waiver of all other grounds of objection. St. Vincent's Inst. Co. v. Davis, 129 Cal. 20, 61 Pac. 477; Berliner v. Travelers' Ins. Co. 121 Cal. 451, 53 Pac. 922; Natoma Water & Min. Co. v. Clarkin, 14 Cal. 544; Evans v. Keystone Gas Co. 148 N. Y. 112, 30 L.R.A. 651, 51 Am. St. Rep. 681, 42 N. E. 513; McCulloch v. Hoffman, 73 N. Y. 615; Durgin v. Ireland, 14 N. Y. 322; Tilton v. Flormann, 22 S. D. 324, 117 N. W. 377; Kollock v. Parcher, 52 Wis. 393, 9 N. W. 67; Texas & P. R. Co. v. Watson, 190 U. S. 287, 47 L. ed. 1057, 23 Sup. Ct. Rep. 681; Delaware, L. & W. R. Co. v. Devore, 58 C. C. A. 543, 122 Fed. 791.

An objection to evidence on the ground that it is incompetent, irrelevant, and immaterial cannot be considered on appeal. Decen. Dig. Appeal & Error, § 231; Buchanan v. Minneapolis Threshing Mach. Co. 17 N. D. 343, 116 N. W. 335; Landis Mach. Co. v. Konantz Saddlery Co. 17 N. D. 310, 116 N. W. 333; H. C. Behrens Lumber Co. v. Lager, 26 S. D. 160, 128 N. W. 698, Ann. Cas. 1913 A, 1128.

The object of an objection to evidence is to enable the court to rule intelligently thereon. Paine v. Crane, 112 Minn. 439, 128 N. W. 574; State v. Brandner, 21 N. D. 310, 130 N. W. 941; Zilke v. Johnson, 22 N. D. 75, 132 N. W. 640; Jones, Ev. p. 470, § 375.

It is proper, on the examination of an expert, to require him to state the reasons upon which he bases his opinions. Lewiston Steam Mill Co. v. Androscoggin Water Power Co. 78 Me. 274, 4 Atl. 555; Keith v. Lothrop, 10 Cush. 453; Chicago, R. I. & P. R. Co. v. Johnson, 25 Okla. 760, 27 L.R.A.(N.S.) 879, 107 Pac. 662; Chicago & N. W. R.

Co. v. Cicero, 154 Ill. 656, 39 N. E. 574; Cincinnati v. Scarborough, 6 Ohio Dec. Reprint, 874; Price v. Richmond & D. R. Co. 38 S. C. 199, 17 S. E. 732; McCabe v. Swift & Co. 143 Ill. App. 404; Fowlie v. McDonald, C. & Co. 82 Vt. 230, 72 Atl. 989; Jones, Ev. pp. 473, 490; 5 Enc. Ev. 613, C.; Missouri P. R. Co. v. Fox, 60 Neb. 531, 83 N. W. 744, 8 Am. Neg. Rep. 463; Oxford Junction Sav. Bank v. Cook, 134 Iowa, 185, 111 N. W. 805; Prout v. Prout, 82 N. J. L. 537, 81 Atl. 757; Blake v. Meyer, 110 App. Div. 734, 97 N. Y. Supp. 424; Duer v. Allen, 96 Iowa, 36, 64 N. W. 682; Smith v. Dawley, 92 Iowa, 312, 60 N. W. 625; Parker v. Ottumwa, 113 Iowa, 649, 85 N. W. 805; Kreigh v. Sherman, 105 Ill. 49; Smith v. Chicago, M. & St. P. R. Co. 26 S. D. 555, 128 N. W. 815; Perrott v. Shearer, 17 Mich. 48; Brooks v. Sioux City, 114 Iowa, 641, 87 N. W. 682; Wendt v. Chicago, St. P. M. & O. R. Co. 4 S. D. 476, 57 N. W. 226; Morrisey v. People, 11 Mich. 327; People v. Lohman, 2 Barb. 216; St. Louis, & S. F. R. Co. v. Sutton, — Ala. —, 55 So. 989; Osborn v. Quincy, O. & K. C. R. Co. 144 Mo. App. 119, 129 S. W. 226; Brinsfield v. Howeth, 110 Md. 520, 73 Atl. 289; Stewart v. Watson, 133 Mo. App. 44, 112 S. W. 762; Baltimore & O. R. Co. v. State, 107 Md. 642, 69 Atl. 439; Voisin v. Jewell, 9 La. 112; Tremain v. Dyott, 161 Mo. App. 217, 142 S. W. 760; Wood v. Omaha, 87 Neb. 213, 127 N. W. 174.

Technical errors and objections should give way to justice. Moran v. Dake Drug Co. 134 N. Y. Supp. 995; Rev. Codes N. D. 1905, § 10157; Standard Oil Co. v. Brown, 218 U. S. 78, 54 L. ed. 939, 30 Sup. Ct. Rep. 669; Press Pub. Co. v. Monteith, 103 C. C. A. 503, 180 Fed. 357.

Exemplary damages are properly allowable in this case. Rev. Codes N. D. 1905, § 6562; Shoemaker v. Sonju, 15 N. D. 518, 108 N. W. 42, 11 Ann. Cas. 1173.

SPALDING, Ch. J. Plaintiff brought this action to recover damages for injuries sustained in a personal altercation with the defendant, over some live stock belonging to him which had trespassed upon land belonging to plaintiff's husband. We do not find it necessary to enter into a detailed statement of the evidence adduced at the trial. A verdict for $2,000 was returned in favor of plaintiff. A new trial was denied on

plaintiff consenting to a reduction of the verdict to $1,740. From the order denying a new trial, and the judgment entered in plaintiff's favor, this appeal was taken. A new trial must be granted. The most important error consisted in the admission of the testimony of an expert witness, and this will be first considered.

1. Plaintiff and some of her witnesses testified to the altercation over the live stock and as to the injuries inflicted upon her by the defendant, her visits to a physician and his prescriptions for her. No attempt appears to have been made to subpœna such physician, until the time of the trial, when he was found to be absent in Canada on a visit. The assault found by the jury to have been committed was made November 6, 1908. The trial occurred in July, 1910. Dr. Per Oyen was called to give his opinion as to the extent of her injury and the ailments claimed to have arisen therefrom, their permanency, etc. He had never treated the plaintiff professionally. He testified that he had known her by sight for a year or two, but had only been acquainted with her two weeks, having, during that time, been called to attend a member of her family, and that he examined her on each of two days during the trial, for the purpose of qualifying himself to testify as an expert; and over objection he was permitted to tell the jury as to the character and extent of her ailments occasioned by the assault complained of and as to their permanency, such testimony being in corroboration of that of the plaintiff and other witnesses, but going directly to the amount of damages which the jury might award her, it being a case in which the amount awarded was largely within the discretion of the jury. He testified that he formed his diagnosis upon "the strength of what I found there, what I made her tell me, her answers to the inquiries I propounded. I diagnosed on that. . . . I began to look into her symptoms, and asked her about it, and wanted to know about the changes from time to time, month after month, in the past, and went through the whole history."

It must be borne in mind that there were no visible evidences of the injury complained of; that is, no scars or wounds visible, at the time of Dr. Oyen's examination. She claimed to have suffered from headaches, nervousness, sleeplessness, heart, and other troubles, and that at the time of the trial she was still suffering to some extent from them, and that they all resulted from the assault of the defendant; that by

reason of these things she had been unable to do housework for six months after the assault, and only a little after that time. It is apparent that, under the circumstances, his opinions must have been mainly formed from her statements of past conditions. The broad question is whether testimony of the doctor, giving his opinion as an expert, as to the extent of her injuries, their probable duration and their effect upon her, based not solely upon what he found by a personal examination or on what she told him for the purpose of enabling him to prescribe for her, but upon her history of the case, dating from the time of the injury to the day of the trial, as well as upon what he observed, or the conditions he found on examination, was properly received. We are not disposed to lay down an inflexible rule on this subject. 1 Greenl. Ev. § 162 b, note, 14. We can imagine a case wherein evidence of this nature might possibly be obtained and in which it might be properly admitted, but this is not such a case. Dr. Oyen was the only medical witness testifying, and upon his opinion the jury was to find, in a very large degree, the extent of her injuries and the amount which she would be entitled to recover, if they found in her favor on the facts. What she told him as to the assault, as to the nature of the injuries inflicted upon her, as to how they affected her between the time of the altercation and the trial, was stated out of court, not in the presence of the defendant or his counsel, not under oath, and solely with a view to qualifying the doctor as an expert and for the bearing it might have upon the verdict, and especially upon the amount of the recovery. The circumstances were such as in no manner to serve as a substitute for an oath, and every opportunity and every temptation was presented, enabling the plaintiff to shade or color her statements with reference to using the doctor as a witness. No more opportune occasion could arise for a party to make self-serving declarations than is disclosed in this record. The result was that the doctor in testifying as to his opinion was usurping, in a measure, the province of the jury. Expert testimony is admissible in many cases, because the subject of the litigation relates to or involves matters which human kind in general are incompetent to or form or offer opinions on, and it becomes necessary to call upon those who have made a special study of the subject under consideration, who are employed or engaged in a line of work which involves the constant investigation and consideration of

such questions; and when they are called as witnesses the scope of their testimony is fairly well limited, and should, in general, be confined to the result of their actual investigations, and not based upon hearsay evidence, self-serving declarations, or statements of other parties made under circumstances admitting of coloration or exaggeration for its effect upon the verdict. A physician called at the time of the injury or near it, when the plaintiff is suffering directly from the injury, and before litigation is contemplated or commenced, may ordinarily base his opinion in part upon what the patient tells him, to enable him to prescribe for his relief. The temptation to misstate, or to exaggerate, or to assign the suffering to the wrong cause, is then insignificant, and the yielding to such temptation, if any, is improbable. The desire to effect the relief of pain or suffering, and to recover, removes in a large measure the temptation to misstate, and the statements made under such circumstances ordinarily become a part of the *res gestæ*. But these reasons do not exist a year and eight months after an injury, and after the commencement of litigation, and when the injured person is relating the history of his case, his symptoms, and his condition solely for the purpose of qualifying the expert as a witness. The authorities on this subject are generally in harmony, although some are cited in treatises as supporting the admission of such evidence; but on an examination of such cases we find few, if any, of them sustaining the points to which they are cited. Reference will be made to them after a brief consideration of some of those supporting our conclusion.

In summing up as to the competency of an expert opinion based upon information which the expert has derived from private conversations with third parties, Dean Rogers in his work on Expert Testimony, at § 46, says that it has never been held that this may be received, and that this does not apply to opinions based in part on statements made by the *patient* to the physician to enable the latter to determine upon a proper course of treatment. Some authorities fail to disclose whether the opinions received were from medical experts who had treated the party, or whether they were called only for the purpose of giving testimony, as in the case at bar. He also lays down the rule, in § 47, at page 161, that the physician cannot give to the jury as evidence either the patient's history of the case, statements in respect to the cause of the trouble or as to past experience with it; *"neither can he express an*

opinion which he bases on such history or statements as to past experience."

The supreme court of Michigan, in Grand Rapids & I. R. Co. v. Huntley, 38 Mich. 537, 31 Am. Rep. 321, held that exclamations of pain were properly excluded from evidence when they were made at a medical examination, which was solely for the purpose of obtaining testimony. To the same effect, see Darrigan v. New York & N. E. R. Co. 52 Conn. 285, 52 Am. Rep. 590, 11 Am. Neg. Cas. 250. The Connecticut court says that to admit them would be to permit "parties to introduce in evidence their own declarations made out of court, not under oath and when the temptation to exaggerate, and even to utter untruths, would be pretty strong." In Atchison, T. & S. F. R. Co. v. Frazier, 27 Kan. 463, the physician who had made an examination of the plaintiff was permitted to testify, from such examination and from the history of the case as detailed by the plaintiff to him, and from statements made by her husband in her presence to him, as to the cause of the malady with which the plaintiff was afflicted; and Judge Brewer, writing the opinion holding this evidence incompetent, says that it would have been perfectly competent for the physician to have testified not merely to the appearance of the wound as he saw it, but also to all statements made by Mrs. Frazier as to her present bodily condition, and to have given to the jury his opinion based upon such examination and statements; *but that it was not competent for the physician to testify as to her statements in respect to the cause of the injury, her past experience in connection with it, or to give his opinion as based upon such history of the case.* And in Heald v. Thing, 45 Me. 392, the court of that state sustained the trial court which permitted a physician, who had made an examination and received a history of the case, to give his opinion as far as it was based upon his personal examination, but he was not permitted to state what the patient had given as the history of the case, or to give the jury an opinion based partially or wholly upon such history.

In Kreuziger v. Chicago & N. W. R. Co. 73 Wis. 158, 40 N. W. 657, it was held that it constituted error to receive as evidence the testimony of a physician upon what the plaintiff and her mother told him, a year and a half after the accident; and the court remarks that such testimony is grossly incompetent and unsafe by all authorities and by

common reason. And in Comstock v. Georgetown Twp. 137 Mich. 541, 100 N. W. 788, the supreme court of Michigan holds that expressions of pain, physical or otherwise, made to physicians called by plaintiff, not to give medical aid but to make up medical testimony, are inadmissible, and cites many authorities in support of its conclusion.

In the case at bar the physician testified at length as to his methods of examination, and stated in effect that the plaintiff could not deceive him as to her condition. In the recent case of Marshall v. Wabash R. Co. 171 Mich. 180, 137 N. W. 89, a reversal on a second trial was ordered, largely because the medical expert who had been called to make the examination to qualify him as a witness was permitted to testify that, in his opinion, the plaintiff was not simulating, on the ground that that question was for the jury; and it was held that the witness should have been confined to the conditions he found and to his opinion based thereon. In harmony with our conclusions is Russell v. Lowell, 11 Gray, 420, where it was held that a surgeon who attended and prescribed for the plaintiff, once three months after the accident, and examined the injuries again after the action was brought, may be allowed to testify to his opinion of the injuries derived from what he saw, but *not from any statements of the plaintiff*. And in Quaife v. Chicago & N. W. R. Co. 48 Wis. 513, 33 Am. Rep. 821, 4 N. W. 658, 10 Am. Neg. Cas. 472, the Wisconsin court held that, where an opinion of an expert is based upon an examination as to the party's present condition, for the purpose of giving evidence and not for the purpose of giving medical advice, an objection would probably be well taken to allowing the expert to take into consideration the party's statements made at such examination; that such statements would be subject to a suspicion that they were made for the purpose of getting an opinion favorable to her. In that case, however, the expert opinions were received because the examination was not sought by the party, and her statements were made in answer to interrogatories put by experts supposed to be impartial, if not hostile, to her, and were made subject to a full cross-examination by the experts, so that there was but very little probability that they were mislead or influenced by any colored or false statements. That is one of the authorities cited as supporting the admission of the testimony of the expert in cases like that at bar.

We will now briefly consider some of the authorities to which we have referred and others cited by respondent to sustain the action of the court in admitting this testimony. In Kansas City, Ft. S. & M. R. Co. v. Stoner, 2 C. C. A. 437, 10 U. S. App. 209, 51 Fed. 649, it was not stated as a general rule that evidence of a physician should be admitted when based in part on statements of past feelings, but that, on the physician's testimony in that case, the fact that there was no conflict of evidence as to the injury, and that the statements to which objection was made were brought out in cross-examination, rendered the evidence nonprejudicial. Consolidated Traction Co. v. Lambertson, 60 N. J. L. 457, 38 Atl. 683, is a strong authority for the appellant. We quote from the syllabus:

"The declarations of a person as to his symptons, made to a physician or surgeon, not for the purpose of treatment, but for the purpose of leading the physician or surgeon to form an opinion to which he may testify as a witness for the declarant, in a suit brought by him for personal injuries, are not admissible in evidence at the instance of the declarant."

This rule, however, was modified in that case, because the court found that the objectionable statements as to past condition were supported by other uncontradicted testimony. In Denver & R. G. R. Co. v. Roller, 49 L.R.A. 77, 41 C. C. A. 22, 100 Fed. 738, the questions objected to were hypothetical questions, and the testimony discussed is that of the party who had been the physician of the injured one for several years; and his testimony was based upon his attendance upon her as a physician; and the court held that it was not error to permit him to give his opinion as to the cause of his patient's condition from his own knowledge from his attendance, treatment, and examinations, although based in part upon her statements and complaints made at different times as to her pains and sufferings. It has no bearing upon the case at bar.

Barber v. Merriam, 11 Allen, 322, also cited, simply goes to the competency of the testimony of a physician as to his conclusions from examining the party as a patient; and the opinion discusses the propriety of admitting the testimony of a physician as to the declarations of the party, made to her physician in attendance for the purpose of giving medical advice and treatment; and that the fact that the state-

ments made in that case by the patient to her physician were, some of them, made after the commencement of the action, only went to the weight of the evidence of the physician. In Kelly v. Pittsburgh, C. C. & St. L. R. Co. 28 Ind. App. 457, 91 Am. St. Rep. 134, 63 N. E. 233, in a very brief opinion, the court seems to sustain the position of respondent, but it does so on the assumption that it is following Barber v. Merriam, supra, which we think it failed to construe correctly. At least it is contrary to the great weight of authority. In Louisville, N. A. & C. R. Co. v. Falvey, 104 Ind. 409, 3 N. E. 389, 4 N. E. 908, the court does not assume to pass upon an opinion based upon a past history of the case, given by the injured party to the expert long after the injury was sustained; hence not in point. In Illinois C. R. Co. v. Sutton, 42 Ill. 438, 92 Am. Dec. 81, the court holds that the expert may state what his patient said in describing his bodily condition, if said under circumstances which free it from all suspicion of being spoken with reference to future litigation, and give it the character of *res gestæ;* but the question involved was quite different from the one in the case at bar. It related to the competency of the expert's repetition of what the injured party told him. In Louisville, N. A. & C. R. Co. v. Snyder, 117 Ind. 435, 3 L.R.A. 434, 10 Am. St. Rep. 60, 20 N. E. 284, the court held that the statements of the injured person descriptive of present pains or symptoms are always competent, although narratives of past occurrences are inadmissible. And in Atchison, T. & S. F. R. Co. v. Johns, 36 Kan. 769, 59 Am. Rep. 609, 14 Pac. 237, the court held that in that case the question went to the weight of the evidence. It said, if the declarations are made to a physician or other person merely for the purpose of obtaining testimony in the party's own case, they might be of very little value, and possibly might, in some cases, be wholly excluded; and that generally they should be allowed to go to the jury; but in that case the evidence to which objection was made was the testimony of parties not physicians, as to what the injured person has told them at different times, between the time of the injury and the trial, when she said she was suffering. We gather very little from any of the authorities to support the action of the trial court in permitting the testimony of the physician that is objected to in the case at bar. We do not say that testimony of this character may not be admissible in some cases and under different

circumstances. As at first indicated, we think the rule may not be inflexible, but, as we shall show later, it was highly improper to receive it in the case at bar.

2. Another error assigned relates to testimony regarding wages of one daughter of plaintiff, and the condition of plaintiff making it necessary for another daughter to remain at home and do the household work; and it is contended that, although the court modified the judgment to the extent of the wages of the daughter, on which a definite value was placed, yet that the jury may have taken into consideration, as a basis for a portion of the damages found, the services of the younger daughter, on which no evidence was offered of value. While we think it a dangerous practice to permit such vague and indefinite evidence to go to the jury, as rendering it possible for them to find damages of this sort, yet we are unable to say, from the record, that the error is prejudicial. Of course the wages of the minor daughters belonged to the father, rather than to the plaintiff, so, as furnishing a partial measure of damages, it was wholly incompetent.

3. Error is also assigned on the admission of certain testimony of the doctor which was in the nature of an argument, in favor of the respondent, to the jury while he was under oath. Without going into particulars regarding this, we hold it erroneous to admit it, and in any new trial it should be excluded. But we shall not at this time say that its receipt was prejudicial.

4. Respondent contends that the error in admitting the testimony of Dr. Oyen regarding his diagnosis was cured by subsequent testimony as to the same things. That such error may often be cured in this manner is true, but he was the expert witness on whose testimony the plaintiff relied to establish, in part, the character of the injuries, their extent, and their permanency; and we are unable to find that there was any prior or subsequent evidence on this subject which can be in any manner held to cure this error.

5. This disposes of the appeal, but we feel required to call attention to the claims of counsel for respondent, found in the last six pages of his brief, wherein he argues that this judgment can only be reversed on technicalities. He makes the stock argument seen in so many newspapers, and in the writings of so many laymen, as to the crime of reversing judgments on technical error. The fundamental fallacy in

his argument consists in assuming that a reversal for the errors disclosed in this case is a reversal on a technical error. On his theory no case should be reversed in which there is any evidence to support the judgment. A reversal on technical error is a reversal on error not going to the substance of the issues or to the substantial rights of the party. He entirely overlooks the fact that every person is entitled to a legal trial, to have his property taken only by due process, and, in a jury case, on a judgment which has been reached by a fair submission of the facts and the law of the case to the jury. In the case at the bar the question as to the responsibility for these injuries—that is, as to who was the aggressor—and the nature of the attack made by the defendant upon plaintiff, was in dispute, with evidence on these points in direct conflict. When such a condition is found and at the same time this court finds incompetent and highly prejudicial evidence received over proper objection, how can this court determine that if such evidence had been excluded, as it should have been, the jury would have arrived at the verdict which it found? The testimony of Dr. Oyen did not go primarily to the fact of the injury, but it was a substantial portion of the evidence before the jury on which it must have based its finding as to the extent of the damage. Without his opinion before the jury—an opinion based on hearsay and self-serving declarations of the plaintiff, on statements made out of court, and not under oath, when the occasion afforded the plaintiff every temptation to exaggerate, and made to a physician who admitted he had been employed by counsel for plaintiff to post him on the medical features of the case, and the only medical expert in the case,—can this court say that the jury would have returned a verdict of equal amount? On the contrary, must not the court presume that, in the absence of the objectionable testimony, a verdict of a different amount would have been reached? The vital questions were the liability of the defendant, and, if liable, the amount of damage. When testimony is received in this way and under such circumstances, and which goes to one of the vital elements involved in the litigation, no court can say that justice has been done; but on the contract the court must say that there has not been a legal trial, and that the verdict has been reached by illegal means. We have seen much, of late, in magazines and newspaper articles criticizing the courts for rendering decisions on technicalities (as they term

it), but, like respondent, they assume that a decision based on any proposition except the guilt or innocence of a party, or the finding for the plaintiff or defendant, is one rendered upon a technicality. Herein they err. Some such discussions commend courts of other states for adopting a rule to disregard technical error, which rule has been in force in this court for years, and is followed without any advertisement of that fact to the world, and, we think, consistently followed.

Respondent cites a section of the new English criminal appeal act, and seems to commend it to the consideration of this court, but, although of recent enactment in England, it but voices the attitude of this court on the subject, and the law of this state as announced and enacted long before 1907, when the English statute was enacted. When the amount of the verdict is based on incompetent and prejudicial evidence, what court can say that, in the language of the English statute, "no substantial miscarriage of justice has actually occurred," or, in the words of a bill recently passed by the national House of Representatives, to which reference is made in the brief, that the error "does not injuriously affect the substantial rights of the party complaining?" It is impossible to say what the verdict would, or should, have been had this evidence been excluded, or even that there would have been a verdict in plaintiff's favor. The order and judgment of the District Court are reversed and a new trial granted.

BURKE, J., being disqualified, did not participate in the above decision.

On Petition for Rehearing.

SPALDING, Ch. J. Respondent has filed a petition for rehearing. It is a very carefully and ably prepared document, and sets forth very clearly counsel's views regarding the questions decided in our original opinion. The writer does not ordinarily consider supplementary opinions on petitions for rehearing as of much value, but the importance of the questions involved in this case, and the apparent misapprehension of counsel as to the decision of the court as to some of them, or the failure of the court to make its meaning clear, leads him to reply to the most important points attempted to be made by counsel, in his

effort to show that the court overlooked questions decisive of the case and duly submitted.

The first contention is that the court has entirely overlooked the nature of the question asked of Dr. Oyen, and erroneously assumes that it calls for hearsay testimony. A careful re-examination of the record leads us to the conclusion that counsel's interpretation of the court's opinion is too narrow. He assumes that we hold the question, "What diagnosis did you form, Doctor, in your examination of her?" to be objectionable only in form. Such was not our intention. If his diagnosis had not been clearly shown to have rested in part at least upon an improper basis, the question would have been proper. But we are called upon to consider the foundation laid for this question. That foundation consisted in the testimony previously given by the doctor as to how he reached his conclusions, and the premises on which they rested. The objection covered this ground. The doctor had been examined in detail with reference to his examination of the plaintiff, from which examination, in all its parts, he formed his opinion called for in the question. His testimony regarding the method of examination was not incompetent. It was his conclusion derived from such examination that was incompetent, and hence appellant was not required to object to questions calling for a description, nor of his method of examination and the basis of his opinion. A proper objection to the final question calling for his opinion, and his conclusions from such examination, was all that was necessary. He testified as to the condition in which he found her by certain tests which he applied; that he formed a diagnosis on the strength of "what he found there, what he made her tell him, her answers to the inquiries propounded;" and that the usual way for a physician to form a diagnosis of a person who comes to him is from all symptoms found, and also from the history of the cases related by the patient; that he must base his conclusion on what he finds, and on what he observes, and on what the patient tells him. This is undoubtedly a correct method to aid in laying a foundation for the question, when the witness is a physician whose patient the plaintiff had been, and who had heard her history of the case to enable him to prescribe for her; but that is not this case, as we have above noted. The mistake of respondent consisted in pursuing the same method of examination that he would have followed had plaintiff

been a patient of the witness, and the opinion founded upon information obtained in treatment. Dr. Oyen made no examination of the plaintiff for many months after the injury was inflicted. He had never been called to prescribe for her, and did not examine her for the purpose of prescribing, but solely to qualify him as a witness in her behalf, and his examinations were made on two days during the progress of the trial. We think the question objected to was clearly inadmissible, and all testimony under it incompetent.

The second point respondent makes is that the doctor later testified to his diagnosis, without objection. It is clear that this fact does not cure the error. The question to which objection was made was comprehensive, and the objection covered all testimony given under that head, even though in response to a repetition of that question or of other things which were necessary elements involved in that question, when propounded to the same witness, and particularly when not covered by the testimony of other witnesses of the same class; that is, experts. Every practising attorney knows that constantly interposing objections, and repeating them, and calling for a ruling of the court on the admission of answers to nearly every question, prejudices the jury against the party making the objections. Courts are not required to listen to and decide repetitions of the same objection when wholly unnecessary to protect the rights of a party. An objection properly interposed to a general question covers all subsequent questions on the same subject propounded to the same witness, and having for their object the eliciting of answers necessarily included in the answer to the main question. Subsequent objections are not required in a case like this. The objection to the general question intended to bring forth the opinion of the witness as to the condition, etc., of the plaintiff was sufficient to cover subsequent questions of the same nature, and to secure a review of the errors in the admission of testimony of like character from the same witness. This question has already been passed upon by this court in American Mortg. Co. v. Mouse River Live Stock Co. 10 N. D. 290, 86 N. W. 965, and the court said: "There was a general objection that said deed was incompetent, and to this was added the specific objection that no 'foundation' had been laid, and that it did not appear that E. M. Prouty had any record title, or any title whatever. Defendant was chargeable with notice that when he offered a record of an original in-

strument in evidence, preliminary proof is needed as a foundation for such secondary evidence, and in this case the attention of defendant's counsel was called to the fact that the proper foundation had not been laid." And the court held that reiterated objections were unnecessary, as all of the evidence was of the same quality and class. See also Salt Lake City v. Smith, 43 C. C. A. 637, 104 Fed. 457, an opinion by the circuit court of appeals of this circuit. It is there said that: "The single exception which they took presented the entire question of the introduction of this hearsay testimony, and elicited a ruling of the court upon it which was conclusive and controlling at that trial of this case. There was no reason or call for further objections to evidence of this character, and their only effect would have been to annoy the court and to delay the trial. When a question has once been fairly presented to the trial court, argued, and decided, and an exception to the ruling has been recorded, it is neither desirable nor seemly for counsel to continually repeat their objections to the same class of testimony, and their exceptions to the same ruling, which the court has advisedly made as a guide for the conduct of the trial." See also Sharon v. Sharon, 79 Cal. 633, 22 Pac. 26, 131; Gilpin v. Gilpin, 12 Colo. 504, 21 Pac. 612; Whitney v. Traynor, 74 Wis. 289, 42 N. W. 267; Jones, Ev. § 894. The testimony of the doctor in the case at bar clearly shows that his opinion was founded upon not only his physical examination of the plaintiff during the progress of the trial, but upon her history of the case given him while he was making such examination. His evidence on this subject was not entirely cumulative, as he was the only physician who testified. Neither was it cured, as contended by respondent, by the introduction in evidence of prescriptions given by the doctor who had attended her after the injury, as they were of medicines which were suitable for ailments which might have arisen from one or more of many different causes, if such prescriptions were admissible at all. In this connection we may remark that counsel is also in error in his argument that we base our opinion upon a misunderstanding that the doctor testified that the assault and battery was the cause of the present condition of plaintiff. The language used in the opinion, if susceptible of such construction, was intended to mean the cause generally, and not specifically. Technically we suppose the meaning of the objectionable question in its use of

the word "diagnosis" might be limited, but in the testimony preliminary to that question he had shown in what sense the word was used, and it comprehended, as used, all that our opinion states. He criticizes our citation of Atchison, T. & S. F. R. Co. v. Frazier, 27 Kan. 463, as an authority, because in that case the history of the case was told to the expert in the presence of the plaintiff by her husband. We are not able to distinguish between the principle announced in that case and the case at bar. Neither are we, as to the other cases, criticized in the petition. In each we think the principle announced is either fully or partially applicable to the instant case.

We think that we have herein covered all the questions raised in the petition that merit notice. We may, however, add that a large part of respondent's original brief was devoted to the discussion of the sufficiency of the evidence to sustain the verdict, and the logic of counsel's argument is that where there is evidence to sustain the verdict the judgment should not be reversed, regardless of the admission of incompetent and prejudicial evidence. The question of the sufficiency of the evidence was not in this appeal. It is true that in this case other witnesses testified to the injuries inflicted and the apparent results, but Dr. Oyen was the only physician who testified, and his testimony must necessarily have had great weight with the jury, and bore directly upon the measure of damages. It is nowhere claimed that it goes to the fact of the injury. As to that the evidence was in conflict, but, having found that the defendant injured the plaintiff, the jury had other duties to perform in reaching a verdict. It was necessary for it to find the amount of damages, and this finding would depend on the permanent effect of the injuries, the probability of a recovery, complete or partial, not simply the extent of the incapacity of the plaintiff to labor, according to her own opinion, but such incapacity, if any, as one competent to judge of its permanency and whether it came from natural causes or some unnatural cause, would testify to; and great care was, under the circumstances, incumbent upon counsel and the court to admit no incompetent evidence which might tend to magnify the damages, or to admit an expert opinion based upon any suspicion which might furnish an erroneous foundation. The petition for rehearing is denied.

TURNER v. F. R. CRUMPTON and W. H. Crumpton, Copartners as Crumpton & Crumpton.

(141 N. W. 209.)

Motion for judgment — motion for new trial — practice — nonappealable order.

An order denying a motion for judgment notwithstanding the verdict is not an appealable order. To be reviewed on appeal such an order must be included in or connected with a denial of a motion for a new trial.

Opinion filed April 10, 1913.

From an order of the District Court for Nelson County; *Templeton,* J., denying judgment *non obstante veredicto,* defendants appeal.

Appeal dismissed.

Frich & Kelly, for appellants.

The legal relationship of the parties was that of principal and factor. The defendants as plaintiff's agents, upon compliance, in good faith, with plaintiff's directions, were entitled to payment for advances and commissions. Champlin v. Church, 76 N. J. L. 553, 19 L.R.A.(N.S.) 261, 70 Atl. 138; Green v. Feil, 41 Wis. 620; Clifton v. Ross, 60 Ark. 97, 28 S. W. 1085; Brown v. Clayton, 12 Ga. 564; Dow v. Worthen, 37 Vt. 108; Bartlett v. Smith, 4 McCrary, 388, 13 Fed. 263; Thompson Bros. v. Cummings, 68 Ga. 124; Wyeth v. Walze, 43 Md. 426; Field v. Banker, 9 Bosw. 467; Finlay v. Stewart, 56 Pa. 183; Bibb v. Allen, 149 U. S. 481, 37 L. ed. 819, 13 Sup. Ct. Rep. 950; Ruffner v. Hewitt, 7 W. Va. 585; Hoy v. Reade, 1 Sweeny, 626; Wiger v. Carr, 131 Wis. 584, 11 L.R.A.(N.S.) 650, 111 N. W. 657, 11 Ann. Cas. 998; 31 Cyc. 1532.

One is presumed to have authorized his agent to follow the rules and usages of the market chosen, in the execution of his orders, in buying goods. Hallet v. Aggergaard, 21 S. D. 554, 14 L.R.A.(N.S.) 1251, 114 N. W. 696; Taylor v. Bailey, 169 Ill. 181, 48 N. E. 200; VanDusen v. Jungblut, 75 Minn. 298, 77 N. W. 970; Whitehouse v. Moore, 13 Abb. Pr. 112; 19 Cyc. 199.

Defendants were not insurers of the safe arrival of the goods in good condition. Rev. Codes 1905, §§ 5411 to 5416.

Sampson & Sampson and *O. B. Burtness,* for respondent.

A factor is bound to act in good faith and with due diligence. Failing to do so, he is liable to his principal for loss sustained. Roberts v. Cobb, 76 Minn. 420, 79 N. W. 540; Benedict v. Inland Grain Co. 80 Mo. App. 449; Walker v. McCaull, 13 S. D. 512, 83 N. W. 578; Knowles v. Savage, 140 N. C. 372, 52 S. E. 930.

Goss, J. This case has been before this court once before on appeal. See the case of the same title in 21 N. D. 294, 130 N. W. 937, Ann. Cas. 1913 C, 1015. We have examined the original judgment roll, and ascertained that this appeal is taken from an order denying the motion for judgment notwithstanding the verdict, without there being coupled therewith, to confer appellate jurisdiction upon this court, an alternative motion for new trial. This court is therefore without jurisdiction. The appeal is presumably taken under Rev. Codes 1905, § 7225, but does not come within any of the provisions of that statute. An order of denial of a motion for judgment *non obstante veredicto* is not appealable. See cases cited in Decen. Dig. title Appeal and Error, § 109; also Ripon Hardware Co. v. Haas, 141 Wis. 65, 123 N. W. 659; Hodge v. Franklin Ins. Co. 111 Minn. 321, 126 N. W. 1098; J. R. Watkins Medical Co. v. McCall, 116 Minn. 389, 133 N. W. 966; Nelson County v. Bardstown & L. Turnp. Co. 25 Ky. L. Rep. 1777, 78 S. W. 856. Subdivision 1 of § 7225, Rev. Codes 1905, has been held to be identical with the corresponding provision of the Wisconsin statute, in Persons v. Simons, 1 N. D. 243, 46 N. W. 969, which case virtually passes upon this question. See also many cases cited in Hostager v. Northwest Paper Co. 109 Minn. 509, 124 N. W. 213. Considering this order is made on the court's own motion, we may quote the following from Hostager v. Northwest Paper Co. supra: "Though the point is not made by plaintiff, the appeal must be dismissed, for it confers no jurisdiction. We have uniformly declined to consider such appeals, even where the parties expressly consent that they may be heard." As is said in Persons v. Simons, 1 N. D. 243, at page 245, 46 N. W. 969, quoting what is still the first subdivision of § 7225, defining orders that are reviewable as "an order affecting a substantial right made in

any action, when such order in effect determines the action, and prevents a judgment from which an appeal might be taken," it may be said: "It is true that the order is one 'affecting a substantial right.' But, to be appealable, the order must not merely affect a substantial right; it must, in addition thereto, be an order which in effect determines the action, and must also be an order which 'prevents a judgment from which an appeal might be taken.'" The denial of the motion appealed from left a judgment on the merits unassailed, from which an appeal may be taken. In fact, the denial of the motion in nowise affects the final judgment in the case. We are satisfied that this court is without jurisdiction to do aught but dismiss this appeal. It is so ordered.

PRICE E. MORRIS v. MINNEAPOLIS, ST. PAUL, & SAULT STE. MARIE R. COMPANY.

(141 N. W. 204.)

Plaintiff sues for barley alleged to have been lost in transit from a carload shipped from Bordulac, North Dakota, to Superior, Wisconsin. To make proof of loss, evidence was offered that the barley was weighed when taken into the elevator and again when loaded therefrom into the car, with the weights corresponding. The elevator agent testifies that the elevator scales balanced; that he loaded the entire car as one transaction; that he had been in charge of the elevator and similar work at that place for two months prior to that time; that he understood the scales and knew how to use them; and that these weights taken were correct and accurate; that some twenty different weighing operations were necessarily made in loading the car; that the total of these weights and the amount of the barley placed in the car was 62,440 pounds; that the car was then immediately sealed and taken charge of by the carrier. The evidence shows that, on the arrival of the car at Superior, the grain was weighed in bulk, and the state weighmaster's official certificate of weight of this barley showed but 57,480 pounds as the amount delivered by the carrier to the consignee. For this difference in weight, 4,960 pounds of barley, plaintiff seeks to recover of the carrier as for barley lost in transit. The trial court directed a verdict dismissing the action, and plaintiff appeals. *Held:*—

Evidence — preponderance — carrier — delivery.

1. Plaintiff must establish by a fair preponderance of the evidence that a portion of the grain received by the carrier was not delivered at Superior.

Proof of shortage — weights — transportation.

2. That proof of such shortage may be made by evidence of the weight of the grain when delivered to the carrier for transportation and evidence of its weight at destination, when the proof of such weights is reasonably certain and satisfactory.

Sufficiency of evidence — jury — judicial notice.

3. That under the evidence plaintiff has established a prima facie case of loss of some grain in transit, sufficient to submit such question of loss, and amount thereof, to the jury to determine from all the evidence considered with the matters of which they may take judicial notice.

Evidence — weights — language — loss of grain.

4. Certain language used in Miller v. Northern P. R. Co. 18 N. D. 19, 118 N. W. 344, 19 Ann. Cas. 1215, which might be understood as holding that such a loss could not be thus established by proof of weights alone and without other proof of loss in transit, disapproved as misleading and inaccurate.

Opinion filed April 14, 1913.

Appeal from the District Court for Foster County, *Coffey*, J.

Reversed and case remanded for new trial.

T. F. McCue, for appellant.

It is not incumbent upon the shipper of grain to show actual leakage in transit, or to show the actual means of his loss or shortage. Miller v. Northern P. R. Co. 18 N. D. 19, 118 N. W. 344, 19 Ann. Cas. 1215.

A common carrier is an insurer of the safety and delivery of the goods he agrees to carry. Zink v. Lahart, 16 N. D. 56, 110 N. W. 931.

Proof of the weight at delivery and at destination are sufficient. It is presumed that scales weigh correctly. Blackmore v. Fairbanks, M. & Co. 79 Iowa, 282, 44 N. W. 548; Alpha Checkrower Co. v. Bradley, 105 Iowa, 537, 75 N. W. 369; Fox v. Stockton Combined Harvester & Agri. Works, 83 Cal. 333, 23 Pac. 295.

Edward P. Kelly, for respondent.

Presumptions or conjectures that the grain leaked out, or was removed from car, cannot be indulged. Miller v. Northern P. R. Co. 18 N. D. 19, 118 N. W. 344, 19 Ann. Cas. 1215.

There was no competent proof as to the amount of grain delivered

to the carrier. Union P. R. Co. v. Bullis, 6 Colo. App. 64, 39 Pac. 897.

Goss, J. Plaintiff sues the defendant to recover for a shortage on a carload of barley delivered defendant carrier at Bordulac, North Dakota, for transportation and delivery to a consignee in Superior, Wisconsin. Plaintiff makes proof of loss by evidence that 62,440 pounds, by weight, of barley was placed in the car for shipment, and, according to the state weighmaster's certificate on delivery, but 57,480 pounds were received by the consignee; and plaintiff seeks to recover at the market price per bushel for the difference in weights, 4,960 pounds. Defendant offered no testimony; and at the close of the case the trial court concluded that the facts were parallel with those of Miller v. Northern P. R. Co. 18 N. D. 19, 118 N. W. 344, 19 Ann. Cas. 1215, and directed a verdict of dismissal. Plaintiff appeals.

The evidence shows that the barley was hauled by plaintiff's employees to an elevator managed by one Johnson, at Bordulac. The barley was weighed at the elevator as it was received into the elevator, and again weighed out as it was loaded from the elevator into the car, the weights corresponding. At least twenty-one different weighing operations were necessary in loading the car, as but 3,000 pounds could be weighed at once in the hopper from which it was placed in the car. But Johnson's testimony is positive as to weights. He testifies:

"I know the scale was all right. I tested the scales every once in a while to find out whether it was working right, and I know this scale was in good working condition and right when I weighed this grain. I know how many pounds of barley I weighed and put into this car. The amount was 62,440 pounds; and I know that that was the correct amount of barley that I put into that car. Immediately after I loaded the car I went over and billed it out and got a bill of lading. I noticed the car had been sealed when I went over and got the bill of lading. I got this bill of lading immediately after loading the car."

On cross-examination he testified he "did not represent Mr. Morris (plaintiff). The barley that I put into the car came out of the elevator. I ran it down into the hopper and from there on to the hopper

scales, and from there it was weighed and conveyed into the car. Nobody assisted me to load the grain. I loaded it myself and did the whole of the transaction, the weighing and the loading. I had been working there at that time about two months. During the two months I was there I couldn't say whether the scales had been inspected by either the state or county inspector. I don't remember of any such inspection having been made. So that as far as the scales being correct is concerned it is simply my testimony. I was never more particular than the fact that these scales balanced. I am not an experienced inspector, but I am a good mechanic and know everything about them. I never had any experience in testing scales; was never in that line of business. The principal part of my examination of the scales was to see whether or not they were balanced. I weighed the grain all in one operation. I don't mean the entire load was put on the hopper scale at one time; I couldn't put more than 3,000 pounds on it at one time. There were about twenty different weighing operations. The figures that I had down at the time of those weighing operations,—I had them, and if I remember right I gave them to plaintiff. I haven't the figures at this time. I say that the total weight was 62,440 pounds. This was a little more than a year ago that I weighed this grain. I gave the weights to plaintiff the same day. Since the day of weighing I have not had possession of the figures. As soon as the car was billed out and turned over to the railroad I turned the figures over to Morris and I was through with the transaction. That was the last I had to do with it. The operation of weighing and loading a car of grain was an ordinary transaction in my line of business. It was something that I was doing almost every day, and there was nothing different in this operation at that time than the usual operation of loading and weighing out a load of grain. I remained at that elevator for three months. During the time I was there I weighed out and shipped about fifty cars of grain." On redirect examination he stated: "I knew that 62,440 pounds of barley was the actual number of pounds that I put into that car. I was the person who billed out this car of barley and the person who took the shipping bill from the railroad agent. I know of my own knowledge how much the figures showed at the time, both before and after I gave them to Morris."

Plaintiff testifies that the barley "was weighed twice; weighed into the house, then weighed out into the car. I did not weigh it myself, but Johnson did. I was there when part of it was weighed. I know of my own knowledge what the grain weighed into the house and out of it. I know it by the slips that Johnson handed me. The slips both corresponded, when weighed in and weighed out." Witness never saw the car after it left Bordulac. "The only reason I believe that there was a shortage or loss of grain, and which is the basis of my cause of action in this case, was because and is because the figures which I testified to and which the witness Johnson testified to did not correspond with the figures of the weighmaster in Wisconsin. The amount of shortage I claim in this case depends entirely upon the weighing of the grain in Bordulac and Wisconsin." The original bill of lading is in evidence, identifying the car in number by the testimony of the Wisconsin weighmaster's certificate. The testimony of the assistant weighmaster, who issued the certificate, is in evidence. He testifies: "I am the assistant weighmaster who weighed the car referred to in Exhibit A. To my own knowledge I know that the scale was in good condition and working order, and weighed correctly. I know this because it had been tested a short time before and found O. K. I know that I weighed correctly the car described in Exhibit A, and know the number of pounds of barley shown by Exhibit A is the actual number of pounds of barley contained in said car at said time." Exhibit A is the official weighmaster's certificate and is in evidence. Such is the testimony upon which a verdict was directed for the common carrier.

So far as the facts in this case are concerned the common carrier insured the delivery at destination of all the barley that it received from plaintiff for transportation. As is stated in Miller v. Northern P. R. Co. supra, 18 N. D. on page 19, 118 N. W. 344, 19 Ann. Cas. 1215, "a prima facie case is established by proof that the carrier received the goods for transportation and failed to deliver them safely. Conversely stated the rule is that, in order to make out a prima facie case, plaintiff must prove that the goods received by the common carrier were not all safely delivered." Plaintiff must establish by a fair preponderance of the evidence that a portion of the grain received at Bordulac was not delivered at Superior. To make his prima facie case

he has offered the evidence above narrated. Has he made a prima facie case of loss in transit to the amount of the shortage or at all? It is clear that both parties have tried this action with full knowledge of the holding in Miller v. Northern P. R. Co., plaintiff apparently purposely omitting to make any proof of the condition of the car on its arrival at Superior, and defendant assuming that under the Miller Case, construed with Duncan v. Great Northern R. Co. 17 N. D. 610, 19 L.R.A.(N.S.) 952, 118 N. W. 826, that to make a prima facie case plaintiff must establish some facts corroborative of proof of loss besides and beyond mere proof of a difference between initial and terminal weights. In some respects the facts differentiate this case from the Miller Case, but some principles of law there discussed must be here reviewed and affirmed or disapproved.

The trial court has followed certain statements in Miller v. Northern P. R. Co., as appears from the statement of the court to the jury at the time of directing a verdict in favor of the defendant company. In that case the court weighed the evidence, and in discussing the proof of the alleged loss in transit held plaintiff had not made a prima facie case. Such question a trial court, and necessarily on appeal an appellate court, must determine as a matter of law, and thereupon either find that a verdict for recovery would not be supported by the evidence, or, on the contrary, must find the proof sufficient to sustain such a verdict, should one be rendered; in which event the question of loss under a substantial conflict of evidence is for the jury to determine. To determine such prima facie case the court, in Miller v. Northern P. R. Co., considered and discussed the testimony, and in so doing the court was strictly within its province. But from the language of the opinion, especially that used in the opinion on the rehearing had, the holding may be easily misunderstood as announcing a rule to the effect that a prima facie proof of loss cannot be made by proof of the difference between the shipping and terminal weights. Such is not the law. And what was there said upon and concerning presumptions has evidently mislead the trial court in this case, as well as counsel for defendant company. It is our duty to avail of this first opportunity to explain the matter and announce a definite rule.

In speaking of the weights at place of shipment and at place of delivery, in Miller v. Northern P. R. Co. the following language was

used: "Not a scintilla of evidence was offered aside from the above to prove that any flax was in fact lost or removed from the car; plaintiff's entire case resting upon the mere inference aforesaid. Thus it is seen that plaintiff's entire case rests upon a mere inference or presumption based not upon facts, but merely upon other presumptions, to wit, that the Barlow scales were accurate, and that the public record in the state weighmaster's office [at Duluth] speaks the truth. Presumptions or inferences cannot be based upon other presumptions, but must be based upon proven facts. Not only this, but a presumption ordinarily has no probative force, and when contrary evidence is adduced the presumption disappears." Similar statements and reasoning appear at various places in that opinion. This is misleading. Proof of a certain weight is proof of a fact. Whether presumably correct does not matter. Evidence of weight is nevertheless evidence of the fact of an amount to be ascertained by such means. The proof that at shipment this barley weighed 62,440 pounds, prima facie establishes its quantity, the determination of which is essential to a recovery. Proof that at delivery but 57,460 pounds of barley was contained in the car establishes prima facie the amount delivered the consignee. Thus, proof is made of the fact of the amount of grain received and the amount delivered. The amount of loss may be termed a calculation, an inference, or a presumption; it does not matter what. But as it concerns a fact, to wit, a numerical difference in amounts, it must be a fact, inference of fact, or presumption of fact. And as such are but matters of evidence they are for the consideration of the jury, and not ordinarily to be weighed by the court. As such they constitute evidence of the proof of loss in transit. While an inference might be drawn from the number or manner of taking of the weights, that either or both weights are inaccurate, such must be at most but an inference to be drawn by the jury, and not by the court, in weighing the testimony in the determination of the ultimate fact of whether more grain was received by the carrier than was delivered by it to the consignee. These must be but inferences concerning facts in evidence consisting of weights sworn to or established by the testimony; and the accuracy of the weights taken is for the jury to determine. Hence in discussing these questions it was error to assume that there were any presumptions or inferences based upon other presumptions; so, also, the rule that

presumptions cannot be based upon other presumptions can have no application. Presumptions at times are to be dealt with by the court; at other times presumptions are but part of the proof, and for the jury. In determining whether plaintiff has made a prima facie case, the courts must accept the facts or inferences of fact, and but apply the law. And such evidentiary facts to be taken by the court as established for such purposes consist of the evidence of the weights at Bordulac and Superior, which prima facie disclose a difference of 5,000 pounds. This difference is an established fact, not an inference or presumption, so far as the court is concerned. Had this grain been in sacks, instead of in bulk, and 500 sacks been delivered the carrier and 450 sacks been, by the carrier, delivered to the consignee, the inference of shortage would be the same as in this case, though the units or items from which the shortage is deduced would be different. Proof of shortage of 50 sacks might involve inferences of inaccuracy in the counting or other method of computation, but that would be a question of fact for the jury as in any case of conflict of testimony. This question of weights, it is true, involves added elements of uncertainty concerning the accuracy of the scales at both points, and their manner of use, with which the personal elements of honesty and credibility become more important possibly as the opportunity to defraud is thus increased; but all these questions must nevertheless remain questions of fact, and within the province of the jury, and without the province of the court, to determine. For an interesting discussion of presumptions and inferences, see chap. 13 of vol. 2 of Chamberlain's Evidence; chap. 2, and especially § 104, of Jones on Evidence, 2d ed., from which section we quote: "Presumptions must be based upon facts, and not upon inferences or upon other presumptions. 'No presumption can, with safety, be drawn from a presumption.' The fact presumed should have a direct relation with the fact from which the presumption is drawn; but when the facts are established from which presumptions may be legitimately drawn, it is the province of the jury to deduce the presumption or inference of fact. If the connection is too remote or uncertain, it is the duty of the court to either exclude the testimony from which the presumption is sought to be deduced, or to instruct the jury that the evidence affords no proper foundation for any presumption. If, however, the facts are clearly

established forming a proper basis for a presumption of law, the jury has no right to disregard the presumption which the law raises. The presumption in such case is one deriving its force from the law, and not merely from process of reasoning." With initial and terminal weights shown as facts by competent evidence, the law draws therefrom the presumption of shortage for the purpose of carrying the case to the jury for their finding of the truth of the matter. Consult, also, §§ 15 to 48, inclusive, of Greenleaf on Evidence, 16th ed., in which latter section presumptions of fact are treated under the following summary: "This class of presumptions embraces all the connections and relations between the facts proved and the hypothesis stated and defended; whether they are mechanical and physical, or of a purely moral nature. It is that which prevails in the ordinary affairs of life, namely, the process of ascertaining one fact from the existence of another without the aid of any rule of law; and therefore it falls within the exclusive province of the jury who are bound to find according to the truth." See also Wigmore on Evidence, vol. 4, §§ 2490–2494, from portions of which we quote: "And a 'presumption of fact' in the usual sense is merely an improper term for the rational potency or probative value of the evidentiary fact regarded as not having this necessary legal consequence. 'They are in truth but mere arguments,' and 'depend upon their own natural force and efficacy in generating belief or conviction in the mind.' . . . There may be a preliminary question whether the evidence is relevant and admissible as having any probative value at all; but, once it is admitted, the probative strength of the evidence is for the jury to consider. . . . There is, in truth, but one kind of presumption, and the term 'presumption of fact' should be discarded as useless and confusing. Nevertheless it must be kept in mind that the peculiar effect of a presumption 'of law' (that is, the real presumption) is merely to invoke a rule of law compelling the jury to reach a conclusion in the absence of evidence to the contrary from the opponent. If the opponent does offer evidence to the contrary (sufficient to satisfy the judge's requirement of some evidence), the presumption disappears as a rule of law, and the case is in the jury's hands, free from any rule." Any so-called presumptions or inferences deducible from the difference in weights must be of fact, and not of law; and to be finally drawn

by the jury, and not by the court. The proof made of the weights either establishes evidentiary facts, or it does not, according as the jury determine the truth of the matter. But if such facts be taken as true, as they must be taken by the court, plaintiff has established his prima facie case upon which he was entitled to have his case submitted to the jury.

If a difference between the shipper's and consignee's weights, approximating 5,000 pounds, on a carload of 62,000 pounds, where the testimony is positive as to the manner of the taking of the weights, and with the double weighing in and out of the elevator at the initial point as here had, did not make prima facie proof of loss in transit, then it is difficult to see how a distinction in principle could be drawn had the difference in weights been 60,000 pounds, instead of 5,000. If a court is to pass upon this matter as a question of law, where between those limits would the line be drawn at which the case would be regarded as involving a question of fact for the jury's determination? If it can be said that upon mere weights alone no proof of loss can ever be made, why permit evidence of weight to be received? But if it be said that weights have some evidentiary force, but not sufficient of themselves to ever constitute proof of loss, then the question arises: Of what must the corroborating evidence consist that the law will recognize as supplementing the weights sufficiently to make, when considered with the weights, a prima facie case of shortage? And thus we are left to conjecture. This but illustrates the sound rule, that the whole question is one of fact or inference of fact from evidence, and for the jury to determine from the evidence, whether that may consist of weights alone, or of added circumstances corroborative of shortage. And if proof of differing weights entitles plaintiff to go to the jury, it likewise makes proof of a prima facie case upon which, where the testimony, as here, is not conflicting and reasonably certain, plaintiff would be entitled to a finding of the jury upon the question of loss; and if so, the amount thereof; under an instruction from the court that the jury might consider, with the evidence, matters of which judicial notice might be taken, including the possibility of mistake in weights at either end, the interest, if any, of the witnesses in the subject-matter of the suit, natural shrinkage or loss of weight in handling, and any other facts

known or that might be proven which might enter in to explain any discrepancy in weights between the shipping point and destination; from all of which, as a question of fact, the jury must determine whether any less grain was delivered the consignee than was received from the shipper by the common carrier for transportation, and the amount of any such loss.

The only parallel case from another state the writer has been able to find is that of Schott v. Swan, 21 S. D. 639, 114 N. W. 1005, apparently not as strong a case for the shipper as the one before us, because of inaccurate methods disclosed in the evidence of the shipper in arriving at shipping weights. In that case a verdict for the shipper, based upon the bulk weight, though taken by a method that must have been approximate and inexact, was permitted to stand over the testimony of the sworn weights of the grain as it was taken from the car. The court held the question to be one for the jury on the theory of a conflict of evidence.

In view of evidence that may be presented upon a retrial we will say that should it appear, in addition to the facts in evidence, that upon arrival in Superior the car was in good condition, by inference negativing the escape in transit of any grain from the car because of defects in the car, and that on arrival the car was sealed, by inference causing the conclusion that it had not been opened during transit, still the question of whether any of its contents was lost in transit must remain a question for the jury. It may be that to a certain extent the question of loss is thereby left to conjecture, but that must be true to a certain extent in most verdicts. To here hold otherwise would result in exonerating the carrier as a matter of law, even though on arrival this car should be found to have contained but 10,000 pounds of grain, notwithstanding proof was made that over 60,000 pounds was shipped from Bordulac. In that event to assume such a gross variance between the testimony of the shipper and the consignee as to weights to be attributable to a difference in weights only would clearly be an assumption of fact and an invasion by the court of the province of the jury. So, too, must such an assumption, only in lesser degree apparent in this case, be the same in principle. The same rule of law must apply in either and in all cases. And in either case the jury, and not the court, must determine the ultimate fact of loss in

transit. And to announce the rule that the degree of proof offered in this case as to initial and terminal weights does not establish a prima facie case sufficient to invoke the jury's verdict, or that it may be overcome as a matter of law by mere presumptions or inferences of fact to be deduced from the condition of the car on arrival, would be to require of the shipper such a degree of proof of loss as is ordinarily impossible for him to obtain and produce, and announce a rule which will in effect abrogate the common carrier's legal obligation as usually an insurer of property to be transported. Accordingly, where the proof is reasonably certain and satisfactory that grain of a certain quantity, as previously ascertained by its weight, is loaded in bulk in a car for transportation, and then is taken in charge by the common carrier for delivery to a consignee, and proof of the amount of such grain subsequently received by the consignee is made by evidence consisting of a state weighmaster's official certificate, with initial and terminal weights, as so established, differing several thousand pounds on a carload of grain transported, plaintiff is entitled to a finding by the jury as to whether any of the grain has been lost in transit, and, if so, the amount of such loss.

In view of another trial we do not deem it necessary to pass upon a question raised upon the measure of damages.

The judgment appealed from is therefore set aside, and this case remanded for new trial. Appellant will recover costs on appeal.

FISK, J. (concurring specially). I concur in the conclusion above announced and also in much that is said in the opinion, but I do not concur in what is said regarding the case of Miller v. Northern P. R. Co. That case differs from the case at bar in many particulars, as a perusal of the opinion will disclose. There, we held in effect that plaintiff's prima facie showing that grain was lost in transit was so weak and rested on such unsatisfactory proof, the same was overcome by the undisputed evidence tending to show that the shipment was intact upon its arrival at its destination. In the case at bar plaintiff's proof as to loss of grain in transit consists of very clear and positive testimony as to a discrepancy in the weights at the initial and terminal points, as well as the accuracy of such weights, and such proof stands wholly uncontradicted. Clearly, therefore, a prima face case has been made out by plaintiff, and it was error to direct a verdict.

GOLDEN VALLEY LAND & CATTLE COMPANY, a Corporation, v. JOHN JOHNSTONE and Carrie Johnstone, By J. A. Miller, Her Guardian *ad Litem.*

(141 N. W. 76.)

1. Plaintiff and defendants entered into a preliminary executory contract for the exchange of real property, by the terms of which defendants were to pay the difference in the valuations fixed in the contract. The contract was entered into the 18th day of January, 1906, and provided for the exchange of properties before April 1, 1906, and also for the execution of formal contracts, and that on the delivery of such contracts by the respondent, appellants were to convey the real property agreed by them to be conveyed, to respondent. The preliminary contract also contained other requirements of the appellants. Respondent prepared the formal contracts and submitted them within the time named, and on various other occasions, to the appellants for execution. They, on each occasion, refused to execute, giving as their only reason the fact that the records did not show title to the land which was to be conveyed by respondent, to be in respondent. In fact respondent held such land only on an executory contract which provided that it might secure deed to any quarter section of a large amount covered by such contract, on payment of $3 per acre therefor. Respondent informed appellants of this fact, and that it would procure a deed whenever necessary under the terms of their contract. Respondent repeatedly urged appellants to perform as required by the terms of the preliminary contract, but appellants totally failed to comply with any part of the terms thereof. They never paid anything on the contract; they never transferred their property, and never executed the permanent contracts called for, but entered into possession of the land and retained possession until this action was brought to quiet title. It is *Held:*—

Executory contract—real estate—good faith—vendor—vendee—performance—default—justification.

(1) That as a general rule when a contract is entered into in good faith, the vendor having an estate or interest in the land contracted to be conveyed in the future, it is not necessary that he be actually in a situation to perform at the time the contract is made; that the most that is required of him is that he be able to perform when the vendee has a right to call upon him for performance.

(2) That appellants were totally in default, and that the court will not grant specific performance, as demanded in their answer, as against respondent; and that the excuse offered by appellants for their refusal to perform in accordance

Note.—On the question whether fraud may be predicated of misstatement as to title to real property, see notes in 28 L.R.A.(N.S.) 202, and 39 L.R.A.(N.S.) 1140.

with the terms of the preliminary contract furnished no justification for their default.

Representations — fraud — pleading — title.

2. This court does not determine whether a certain circular, advertising lands for sale by respondents, seen by appellants before entering into the contract named, which circular stated that the title was perfect and held under only one conveyance from the government, constituted fraud on the appellants, because, even though they bought on the strength of such representation, fraud was not pleaded, and the record shows that plaintiff was in position at the time designated by the contract to convey merchantable title to defendants had they put themselves in position to demand or receive it.

Contract — specific performance — additional acts.

3. The appellants having been given every opportunity to comply with the terms of their contract, and having never made any attempt to do so, but rather having attempted to cast all the burdens on the respondent and make it take all the risks involved on both sides of the transaction, and having waited until after a material increase in the value of the property to be conveyed to them, before seeking to be relieved from the terms of the contract, and having demanded additional acts on the part of respondent never contemplated, or provided for in the contract, are not in position to maintain specific performance as against respondent.

Judgment — use and occupation — possession.

4. The trial court gave judgment against appellants for $3,000 for the use and occupation of respondent's land while in possession. This judgment is modified and reduced to the sum of $2,185, which, in view of the unsatisfactory condition of the evidence on the subject, is the most this court finds the respondent entitled to recover.

Opinion filed March 18, 1913. On petition for rehearing, April 16, 1913.

Appeal from a judgment of the District Court for Billings County, *Nuchols*, J.

Judgment affirmed as modified.

This action was brought in 1907 to quiet title to sec. 13, in township 138, North of range 106 West. The complaint is nearly in the statutory form, but alleges that the defendants were, at the commencement of the action, in bad faith, without right, in possession and occupation of the premises, and claimed, in bad faith and without right, some estate or interest therein, adverse to plaintiff; and it sets out the

value of the use and occupation thereof during the time the defendants had been in possession; and, in addition to the statutory form of the prayer for relief in such cases, asks judgment for the value of the use and occupation.

The answer, so far as needs be noticed, alleges that plaintiff and defendants entered into a written contract in January, 1906, under the terms of which plaintiff sold the defendants the real estate described, for the sum of $8,000, payable under certain terms and conditions set forth in the contract; that the defendants have performed all of the conditions by them to be performed, as set forth in the contract, except as prevented by plaintiff. It alleges that the contract is still in full force and effect, and has never been cancelled, and that the defendants are, and always have been, ready and willing to perform their part of said contract, and to pay the amount therein required by them to be paid; and that their possession is lawful. The answer also contains a paragraph alleging such contract to be ambiguous in that, for some time prior to January, 1906, the defendant Carrie Johnstone was the actual and record owner of certain described property in the city of Sioux Falls, in the state of South Dakota, and is still the owner thereof, except as such ownership is qualified by the provisions of the contract referred to; and that, under such contract, the defendants agreed to convey the Sioux Falls property as a portion of the purchase price for sec. 13, in lieu of the sum of $4,200; that immediately after the execution of the contract referred to, the defendants took possession of section 13, and have remained in open and actual possession ever since, and put the plaintiff in possession of the Sioux Falls property; and that plaintiff had entered into possession thereof, and has, ever since that date, collected the rents and profits therefrom. It contains also a denial that the value of the use and occupation of sec. 13 is the sum alleged, but that it does not exceed $500 per annum. The prayer for relief demands that defendants be permitted to pay plaintiff the purchase price of sec. 13, and that they have specific performance as against the plaintiff as to such section; and that the title thereto be quieted in defendant. At the time the answer was served some of the payments were not due, and the time had not arrived when a deed from plaintiff was due.

The facts, as far as material to a decision, are as follows: The

defendants, John Johnstone and Carrie Johnstone, his wife, lived at Sioux Falls, South Dakota, and, through the agency of one Murphy, a soliciting agent for the plaintiff, at Sioux Falls, entered into a preliminary contract with the plaintiff as follows:

This agreement made and entered into this 18th day of January, 1906, by and between Golden Valley Land & Cattle Company, of Ramsey County, Minnesota, party of the first part, and John Johnstone, of Minnehaha county, South Dakota, party of the second part,

Witnesseth, That the said party of the first part in consideration of the covenants and agreements of said party of the second part, hereinafter contained, agrees to sell and convey unto the said party of the second part or his assigns, by warranty deed upon the prompt and full performance of said party of the second part of this agreement, the following described premises situate in the county of Billings, in the state of North Dakota, to wit: All of section thirteen (13), township one hundred and thirty-eight (138), range one hundred and six (106), containing six hundred and forty acres (640) more or less, according to the government survey thereof. And the said party of the second part, in consideration of the premises, hereby agrees to pay said party of the first part as and for the purchase price of said premises, the sum of eight thousand dollars ($8,000) on the following terms: The party of the second part agrees to convey by warranty deed, free of encumbrance, the following property situated in the city of Sioux Falls, South Dakota: Lot thirteen (13), block fifty-one (51), Gales Sixth Addition to the city of Sioux Falls; lot one (1), block six (6), Summit Addition to the city of Sioux Falls.

Consideration forty-two hundred dollars ($4,200).

The party of the second part further agrees to deed his property to first party when first party delivers to second party contracts covering above-described land as follows: One contract covering the E. ½ of section thirteen (13) township one hundred thirty-eight (138), range one hundred and six (106), showing a balance due of one thousand and three hundred dollars ($1,300) payable on or before four (4) years with 6 per cent interest; and one contract covering the W. ½ of section thirteen (13) township one hundred thirty-eight (138), range one hundred and six (106) showing a balance of twenty-five hundred

dollars, ($2,500) payable in five (5) annual payments and drawing 6 per cent interest.

Provided, However, that in case the party of the second part is unable to secure two or three homesteads in the immediate vicinity of the above-described land, then in that case the party of the second part is to have the privilege of selecting land of equal value similarly located, containing the same number of acres, at the same price, or at such price as may be agreed upon by both parties to this agreement.

Party of the second part agrees to pay all taxes that may hereafter become due upon said premises. But should default be made in the payment of said several sums of money, or any or either of them, or any part thereof, or in the payment of interest or taxes or any part thereof, or in any of the covenants herein to be by said party of the second part kept or performed, then this agreement to be void, at the election of the said party of the first part, time being the essence of this agreement.

It is hereby agreed that any moneys heretofore paid on this contract shall be treated as settled damages for breach thereof, and that under such default said party of the first part is to have possession of said premises. The conditions of this contract shall bind the heirs, executors, administrators, and assigns of each party hereto.

In Witness Whereof, said parties have hereunto respectively set their hands and seals the day and year first above written.

Golden Valley Land & Cattle Co.,
D. J. McMahon, Sec.
John Johnstone.
Carrie Johnstone.

Papers to be exchanged on or before April 1, 1906.

No money was paid on the transaction. In March, 1906, plaintiff prepared, executed, and sent to Murphy, at Sioux Falls, contracts to take the place of the preliminary contract. They were taken to the defendants by Murphy to secure their signatures, and they were asked to sign them. Murphy was then informed by defendants that they would not sign them, because the abstract did not show that plaintiff had any title to section 13. No objection was made to the form or terms of the contracts presented, either at this time or any other time,

by the defendants. The contracts were presented to the defendant John Johnstone, and his signature requested several times, until February, 1907, when they were sent to a bank at Beach, North Dakota, near which place defendants were then residing. Johnstone was notified that they were in the bank, and that he could go there and sign them. The bank was given instructions, and also notified him of the contracts being in its hands. He again refused to execute. On all these occasions the reason given for the refusal, and the only reason, was that the plaintiff did not have record title to section 13. A voluminous correspondence was conducted in the meantime between the parties; and their letters are in evidence, showing the fact stated to be the only reason assigned by Johnstone for refusing to execute the new contracts, or to make a deed of the Sioux Falls property and to make the payments called for. During all this time plaintiff was seeking to carry out the terms of their contract, and to have the defendants do likewise. Plaintiff, in fact, held the land on contract from a third party, which contract provided that plaintiff could secure title to any quarter section of a large body of land, including section 13, on payment of $3 per acre. They informed the defendants, on different occasions, of the terms of their contract, and that they would produce a warranty deed as contemplated, when defendants had complied with the terms of the contract on their part. It is unnecessary to set out the correspondence in full, further than to say that, on April 18, 1907, the following letter was written to and received by Johnstone:

April 18, 1907.

Mr. John Johnstone,
Beach, N. D.

Dear Sir:—

Referring further to your letter of April 10th, we thought best to inclose you a copy of the contract which we hold with you. You will note, upon reading this contract, that we made no agreement to show title to this land in ourselves, and we have attempted to comply with all the requirements of this contract. If you do not believe it, present it to some attorney for his opinion.

Believing that you were entitled to know what title we have on this land, we are herewith inclosing to you a letter from the Missouri Slope

Land & Investment Company, signed by the Secretary and Manager, Mr. H. A. Hunter, stating that the land is owned by his company in fee simple, and was purchased by our company, and that our contract is in good standing, everything being paid up to date that is due upon it. This certainly ought to be satisfactory to you. In any event it is all that we have to offer.

This transaction and one other have been more trouble and annoyance to us than all the lands that we have sold in Golden Valley. If you are ready to comply with the requirements of this contract, copy of which we inclose to you, we will forward papers in accordance with same; otherwise we will have to take steps to cancel the agreement, as we cannot and will not let this matter drag along in the shape it is any longer.

We will expect an early reply from you in reference to this proposition.

In reply to the letter of April 18th, Johnstone wrote the plaintiff, refusing to execute the contracts, again giving as the reason that plaintiff did not have the required title to sec. 13. This resulted in the service on the defendants, John Johnstone and Carrie Johnstone, on the 11th day of May, 1907, of a notice, in due form, that they had defaulted in the terms of their contract, and that the same would be canceled at the expiration of thirty days after such service; and on the 11th of June, defendant John Johnstone was notified by letter that the time had expired under such notice, and that such contract was null and void for failure, on the part of defendants, to fulfil its provisions. Whereupon the defendants applied to the judge of the district court for an order enjoining the cancelation or foreclosure of the contract,—we suppose on the theory that it was, in effect, a mortgage,—and requiring any further steps to be taken in court. The application was granted. Thereupon this action was brought.

On trial, judgment was rendered in plaintiff's favor, canceling the contract between the parties, and holding it null and void, and that neither of defendants had any estate or interest in or lien or encumbrance on such land, and enjoining them from interfering with the rights of plaintiff therein, and awarding the plaintiff the sum of $3,000 for the value of the use and occupation thereof, and for costs and dis-

bursements. From such judgment this appeal is taken. We may add that defendants went into occupation of section 13 after having refused to execute the contracts provided for; that the plaintiff has never been in possession of the Sioux Falls property, but that the rents accruing thereon after the execution of the preliminary contract were paid to and held by Murphy, by direction of the defendants; that the defendants have failed to pay the taxes on section 13, as well as upon the Sioux Falls property, and have cropped various amounts on section 13 from 1906 to the time of the trial. The defendant Carrie Johnstone became insane in the fall of 1906, and was thereafter adjudged insane, and it is claimed by plaintiff that this contract cannot be specifically enforced, because of lack of mutuality, and because of the inability on the part of defendants to perform, and because the title of the Sioux Falls property was in the name of Carrie Johnstone, who could not convey, nor anyone for her, by reason of her insanity. This, among other questions raised, need not be considered.

Heffron & Baird and *J. A. Miller,* for appellants.

The defendants had the right to rescind the contract for fraud, or to stand on the same and wait for plaintiff to perform as per contract. Haffey v. Lynch, 143 N. Y. 241, 38 N. E. 298; Curtis v. Gutz, 90 Iowa, 767, 58 N. W. 883; Tharp v. Lee, 25 Tex. Civ. App. 439, 62 S. W. 93; Clover v. Gottlieb, 50 La. Ann. 568, 23 So. 459; Cleveland v. Bergen Bldg. & Improv. Co. — N. J. Eq. —, 55 Atl. 117; Page, Contr. § 1434; Taylor v. Longworth, 14 Pet. 172, 10 L. ed. 405.

To contract to do a thing impossible at the time, but unknown to the other party, is an immediate breach of the contract. Bishop, Contr. 2d ed. § 1427; Woods v. North, 6 Humph. 309, 44 Am. Dec. 312.

Default on part of anyone to a contract excuses nonperformance by the other party. Brace v. Doble, 3 S. D. 110, 52 N. W. 586; Peck v. United States, 102 U. S. 64, 26 L. ed. 46.

A purchaser of land cannot be compelled to execute the contract where vendor has only bond for title. Christian v. Clark, 10 Lea, 630; Fildes v. Hooker, 2 Meriv. 424; Read v. Power, 12 R. I. 16; 3 Parsons, Contr. 9th ed. p. 350, and note.

Until plaintiff had title to the land, defendants made payments to

plaintiff at their peril. McCarthy v. Couch, 37 Minn. 124, 33 N. W. 777; Donnelly v. Eastes, 94 Wis. 390, 69 N. W. 157.

Before plaintiff can deprive defendants of their farm, in a court of equity, it should come into such court with clean hands—showing that it has done and is willing to do equity. Lewis v. Holdrege, 56 Neb. 379, 76 N. W. 890; Michigan Pipe Co. v. Fremont Ditch, Pipe Line & Reservoir Co. 49 C. C. A. 324, 111 Fed. 284; 2 Pom. Eq. Jur. § 401.

Where vendor places himself in a position such as to make it appear that tender will be refused, no tender is necessary before suit, and an offer to bring the money found due into court is sufficient. Deichmann v. Deichmann, 49 Mo. 107; Fall v. Hazelrigg, 45 Ind. 576, 15 Am. Rep. 278; Young v. Daniels, 2 Iowa, 126, 63 Am. Dec. 477.

One who signs a contract at the request of the opposite party is a party to such contract, even though her name is not mentioned in the body of the contract. Thompson v. Coffman, 15 Or. 631, 16 Pac. 713; Ex parte Fulton, 7 Cow. 484; Scheid v. Leibschultz, 51 Ind. 38; Kendall v. Kendall, 7 Me. 172; Clark v. Rawson, 2 Denio, 135; Martinson v. Regan, 18 N. D. 467, 123 N. W. 285; Galbraith v. Payne, 12 N. D. 164, 96 N. W. 258; Burke v. Scharf, 19 N. D. 227, 124 N. W. 79.

Purcell & Divet, T. F. Murtha, and *Engerud, Holt, & Frame,* for respondent.

The statement of the case does not contain all the evidence offered, and this court cannot review the case *de novo.* Security Improv. Co. v. Cass County, 9 N. D. 553, 556, 84 N. W. 477; Douglas v. Glazier, 9 N. D. 615, 84 N. W. 552; Douglas v. Richards, 10 N. D. 367, 87 N. W. 600; Salemonson v. Thompson, 13 N. D. 182, 101 N. W. 320; Stevens v. Myers, 14 N. D. 398, 104 N. W. 529; United States Sav. & Loan Co. v. McLeod, 10 N. D. 111, 86 N. W. 110; Eakin v. Campbell, 10 N. D. 416, 87 N. W. 991; Geils v. Fleugel, 10 N. D. 211, 86 N. W. 712; Kipp v. Angell, 10 N. D. 199, 86 N. W. 706; Douglas v. Glazier, 9 N. D. 615, 84 N. W. 552; Little v. Phinney, 10 N. D. 351, 87 N. W. 593; Rev. Codes, § 7229.

In the abstract, there is a demand for a retrial of all issues, and also an "assignment of errors." Neither of these is printed with and as a part of the statement, and this court is without jurisdiction to try the case *de novo.* Sternberg v. Larson, 20 N. D. 635, 127 N. W. 993;

State Finance Co. v. Mather, 15 N. D. 394, 109 N. W. 350, 11 Ann. Cas. 1112; Kelly v. Pierce, 16 N. D. 234, 12 L.R.A.(N.S.) 180, 112 N. W. 995; Kinney v. Brotherhood of American Yeomen, 15 N. D. 30, 106 N. W. 44; Rule XVII, 6 N. D. XXIII; State v. Wright, 20 N. D. 220, 126 N. W. 1023, Ann. Cas. 1912C, 795; Sucker State Drill Co. v. Brock, 18 N. D. 532, 123 N. W. 667; Smith v. Kunert, 17 N. D. 120, 115 N. W. 76; O'Keefe v. Omlie, 17 N. D. 404, 117 N. W. 353; Marck v. Minneapolis, St. P. & S. Ste. M. R. Co. 15 N. D. 86, 105 N. W. 1106.

Defendant Carrie Johnstone was not a party to the contract, so as to acquire any rights to the land in question. Blackmer v. Davis, 128 Mass. 538; Lancaster v. Roberts, 144 Ill. 213, 33 N. E. 27; Evans v. Conklin, 71 Hun, 536, 24 N. Y. Supp. 1081; Lothrop v. Foster, 51 Me. 367; Cox v. Wells, 7 Blackf. 410, 43 Am. Dec. 98; Davis v. Bartholomew, 3 Ind. 485; M'Farland v. Febiger, 7 Ohio, pt. 1, p. 194, 28 Am. Dec. 632.

The contract in this case was merely a preliminary agreement, and not a complete enforceable contract of which specific performance can be compelled. Sibley v. Felton, 156 Mass. 273, 31 N. E. 10; Los Angeles Immigration & Land Co-op. Asso. v. Phillips, 56 Cal. 545; Kulberg v. Georgia, 10 N. D. 461, 88 N. W. 87.

Plaintiff was in a position to acquire the full legal title to convey to defendant according to agreement, when the time came to do so. Espy v. Anderson, 14 Pa. 311; Irvin v. Bleakley, 67 Pa. 29; Martinson v. Regan, 18 N. D. 467, 123 N. W. 285; Townshend v. Goodfellow, 40 Minn. 312, 3 L.R.A. 739, 12 Am. St. Rep. 736, 41 N. W. 1056; Easton v. Montgomery, 90 Cal. 307, 25 Am. St. Rep. 123, 27 Pac. 280; Haffey v. Lynch, 143 N. Y. 241, 38 N. E. 298; Irvin v. Bleakley, 67 Pa. 29; Tierman v. Roland, 15 Pa. 440; Loveridge v. Coles, 72 Minn. 57, 74 N. W. 1109; Robb v. Montgomery, 20 Johns. 15; Runkle v. Johnson, 30 Ill. 328, 83 Am. Dec. 191; Silfver v. Daenzer, 167 Mich. 362, 133 N. W. 16.

Plaintiff was ready, willing, and able to fully perform, and offered to do so. Easton v. Montgomery, 90 Cal. 307, 25 Am. St. Rep. 123, 27 Pac. 280; Warvelle, Vend. & P. § 289; Richards Trust Co. v. Beach, 17 S. D. 432, 97 N. W. 358; Stearns v. Clapp, 16 S. D. 558, 94 N. W. 430; Donley v. Porter, 119 Iowa, 542, 93 N. W. 574; 3

Page, Contr. §§ 1436–1443; Bryson v. McCone, 121 Cal. 153, 53 Pac. 637; Stephenson v. Cady, 117 Mass. 6; Armstrong v. St. Paul & P. Coal & I. Co. 48 Minn. 113, 49 N. W. 233, 50 N. W. 1029; Peters Grocery Co. v. Collins Bag Co. 142 N. C. 174, 55 S. E. 90; Johnson Forge Co. v. Leonard, 3 Penn. (Del.) 342, 57 L.R.A. 225, 94 Am. St. Rep. 86, 51 Atl. 305; Pearce v. Alward, 163 Mich. 313, 128 N. W. 210.

Where it is apparent that an offer to perform would be unavailing, it is not necessary. Fargusson v. Talcott, 7 N. D. 183, 73 N. W. 207; Plummer v. Kelly, 7 N. D. 88, 73 N. W. 70; 36 Cyc. 702.

Where a contract is submitted to the opposite party for examination, and he fails to point out objections, he is estopped to come into court and make them afterwards. Woodward v. McCollum, 16 N. D. 47, 111 N. W. 623; Frenzer v. Dufrene, 58 Neb. 432, 78 N. W. 719; North Dakota Horse & Cattle Co. v. Serumgard, 17 N. D. 478, 29 L.R.A.(N.S.) 508, 138 Am. St. Rep. 717, 117 N. W. 453; Rankin v. Rankin, 216 Ill. 132, 74 N. E. 763; Boston & W. Street R. Co. v. Rose, 194 Mass. 142, 80 N. E. 498; Zeimantz v. Blake, 39 Wash. 6, 80 Pac. 822.

Specific performance of a contract will not be decreed, unless it can be enforced against the party seeking it, were he unwilling. Knudtson Land Co. v. Robinson, 18 N. D. 12, 118 N. W. 1051; 36 Cyc. 622, note 19; Pom. Spec. Perf. 406; Buswell v. O. W. Kerr Co. 112 Minn. 388, 128 N. W. 459, 21 Ann. Cas. 837; George v. Conhaim, 38 Minn. 338, 37 N. W. 791; Steiner v. Zwickey, 41 Minn. 448, 43 N. W. 376; Bigler v. Morgan, 77 N. Y. 312; Maupin, Marketable Title, 2d ed. p. 47; Hussey v. Roquemore, 27 Ala. 281; Coffin v. Heath, 6 Met. 76; Whitney v. Stearns, 11 Met. 319; St. Clair v. Smith, 3 Ohio, 355; 22 Cyc. 664; Ralston v. Lahee, 8 Iowa, 17, 74 Am. Dec. 291; Melton v. Brown, 20 Ky. L. Rep. 882, 47 S. W. 764; Daingerfield v. Smith, 83 Va. 81, 1 S. E. 599; Waterman v. Lawrence, 19 Cal. 210, 79 Am. Dec. 212; Eidam v. Finnegan, 48 Minn. 53, 16 L.R.A. 507, 50 N. W. 933; Rankin v. Schofield, 70 Ark. 83, 66 S. W. 197; 22 Cyc. 698, 699; Blanton v. Rose, 70 Ark. 415, 68 S. W. 674; Washabaugh v. Hall, 4 S. D. 168, 56 N. W. 82; Watts v. Waddle, 6 Pet. 399, 8 L. ed. 441; Adams v. Hartzell, 18 N. D. 221, 119 N. W. 637; Murphy v. Plankinton Bank, 13 S. D. 501,

83 N. W. 575; Probate Code (S. D.) § 219, (F. 1298); Rome Land Co. v. Eastman, 80 Ga. 683, 6 S. E. 586; Higginbotham v. Thomas, 9 Kan. 328; Black Hills Nat. Bank. v. Kellogg, 4 S. D. 312, 56 N. W. 1071; Williams v. Schembri, 44 Minn. 250, 46 N. W. 403; 36 Cyc. 638; 44 Cent. Dig. cols. 1688–1696.

Oral arrangements cannot be permitted to contradict written instruments as to the transfer of land. Fitzgerald v. Burke, 14 Colo. 559, 23 Pac. 993; Bradley v. Harter, 156 Ind. 499, 60 N. E. 139; Ft. Scott Coal & Min. Co. v. Sweeney, 15 Kan. 244, 12 Mor. Min. Rep. 166; 11 Cent. Dig. col. 2018; Johnson v. Pugh, 110 Wis. 167, 85 N. W. 641; Merchants' State Bank v. Ruettell, 12 N. D. 519, 97 N. W. 853; First Nat. Bank v. Prior, 10 N. D. 146, 86 N. W. 362; Page, Contr. § 1350; Cughan v. Larson, 13 N. D. 379, 100 N. W. 1088; Foster v. Furlong, 8 N. D. 282, 78 N. W. 986; Mettel v. Gales, 12 S. D. 632, 82 N. W. 181.

In specific performance cases, where money compensation is awarded in lieu of deficiency of the land to be conveyed, it must be fixed at the actual value of the land which ought to be conveyed. Rev. Code, §§ 6610 and 6611; 6 Pom. Eq. Jur. §§ 831–837.

Cash can only be substituted for land, in such cases, where the other party is willing to accept it. 6 Pomeroy, Eq. Jur. § 833; 2 Warvelle, Vendors, § 749; Knudtson v. Robinson, 18 N. D. 12, 118 N. W. 1051.

The practical construction of a contract, placed upon it by the parties to it, will control. 9 Cyc. 588, note 45; 9 Cyc. 590, notes 47 and 48; Page, Contr. §§ 1126, 1127; Topliff v. Topliff, 122 U. S. 121, 131, 30 L. ed. 1110, 1114, 7 Sup. Ct. Rep. 1057; Western U. R. Co. v. Smith, 75 Ill. 496; Vermont & C. R. Co. v. Vermont C. R. Co. 34 Vt. 63.

Defendants' inability and refusal to perform abrogated the contract, and plaintiff could so treat it without formal notice of cancelation. N. D. Rev. Code, § 7494; Gen. Laws (Minn.) 1897, chap. 223, p. 431; Joslyn v. Schwend, 85 Minn. 130, 88 N. W. 410; Womack v. Coleman, 92 Minn. 328, 100 N. W. 9; Arnett v. Smith, 11 N. D. 55, 88 N. W. 1037.

The acts of the defendant constituted an abrogation and renunciation of the contract, and his rights were terminated, without notice. Simp-

son v. Atkinson, 39 Minn. 238, 39 N. W. 323; Meyers v. Markham, 90 Minn. 230, 96 N. W. 335, 787; 36 Cyc. 728; 9 Cyc. 649; 3 Page, Contr. §§ 1436–1443; Stanford v. McGill, 6 N. D. 543, 38 L.R.A. 760, 72 N. W. 938; Giltner v. Rayl, 93 Iowa, 16, 61 N. W. 225; Beyson v. McCone, 121 Cal. 153, 53 Pac. 637; Stephenson v. Cady, 117 Mass. 6; Armstrong v. St. Paul & P. Coal & I. Co. 48 Minn. 113, 49 N. W. 233, 50 N. W. 1029; Peters Grocery Co. v. Collins Bag Co. 142 N. C. 174, 55 S. E. 90; Johnson Forge Co. v. Leonard, 3 Penn. (Del.) 342, 57 L.R.A. 225, 94 Am. St. Rep. 86, 51 Atl. 305; Pearce v. Alward, 163 Mich. 313, 128 N. W. 210; Judd v. Skidmore, 33 Minn. 140, 22 N. W. 183; Rossbach v. Micks, 89 Neb. 821, 42 L.R.A. (N.S.) 444, 132 N. W. 526.

SPALDING, Ch. J. (after stating the facts as above). The defendants' contention and attitude during all the time since the execution of the contract set out above have been based upon the supposition that the contract called for title in plaintiff at the time it was entered into, and that, without such title, defendants could not be compelled to perform in accordance with the requirements of the contract. Herein they are mistaken. The contract did not require title to be in plaintiff when executed. The plaintiff did not agree to show title in itself at such time. It agreed to convey title at a future date. While it is altogether probable that, had the plaintiff been without any interest in section 13, the contract to convey might not be sanctioned, yet it is well-established law that, as a general rule, when a contract is entered into in good faith, the vendor having an estate or interest in the land, it is not necessary that he be actually in a situation to perform at the time the contract is made; that the most that is required of him is that he be able to perform when the vendee has a right to call upon him for performance. This is the established law of this state. Martinson v. Regan, 18 N. D. 467, 123 N. W. 285. See also: Townshend v. Goodfellow, 40 Minn. 312, 3 L.R.A. 739, 12 Am. St. Rep. 736, 41 N. W. 1056; Easton v. Montgomery, 90 Cal. 307, 25 Am. St. Rep. 123, 27 Pac. 280; Gray v. Smith, 76 Fed. 525.

Courts do not make contracts for parties. Had defendants desired a perfect title before transferring their property or making payments, they should have contracted with reference to the title, at the date of

contract, rather than for a conveyance to be based alone on the title of plaintiff at a future date. For this reason the excuse offered by defendants for their refusal to perform in accordance with the terms of the contract, or at all, was invalid, and furnished no justification for their default in the terms of the contract which they had entered into. Authorities cited by defendants are not in point, on this contract, in this state.

As far as the equities in this case go, the record discloses, and particularly the correspondence, which we have not set out, that for many months the plaintiff was seeking to carry out its agreement, and was only requiring of the defendants that they perform on their part the conditions which were required by the contract they had made. The contracts which were presented to defendants were executed by the plaintiff, and all that was necessary in the first instance was for the defendant to have executed them, and to have deeded the Sioux Falls property, as the defendant John Johnstone agreed to do. We need not consider whether the contract was the joint contract of John and Carrie Johnstone or only the contract of John Johnstone, in the view of the law which we take. It seems to have developed that the title to the Sioux Falls property was in Carrie Johnstone, and that, after her becoming insane, she could not have executed, and there was no one who, on her behalf, could have executed, a warranty deed thereto. This, however, we deem, under the facts, immaterial. They were given every opportunity that any reasonable person could demand, to perform. They refused until the value of the land had greatly enhanced, and then alleged that they were ready to perform, and claimed the right to pay all cash, instead of conveying the Sioux Falls property as a part of the consideration. The plaintiff proceeded in accordance with the provisions of our statute for the cancelation of contracts. No equities arose over any payments made, because none had been made by the defendants, and it appears to us to be a clear case in favor of the plaintiff.

We may add that there was some claim made in argument, of fraud on the part of plaintiff by reason of the fact that defendants had seen, or been given, a circular advertising lands for sale by plaintiff, which circular stated that the title was perfect and held under only one conveyance from the government. Whether, had defendants bought on

the strength of this representation, it would have constituted fraud on the part of plaintiff, need not be determined, as fraud was not pleaded; and the record shows that plaintiff was in position, at the time designated, to convey a merchantable title to defendants had they put themselves in position to demand or receive it.

To sum the case all up, it amounts to this, that the plaintiff held an equitable title to section 13, and could procure legal title thereto whenever needed; that the defendants were given every opportunity to comply with the terms of their contract, but never made any attempt to do so. They paid nothing down; they failed to transfer their Sioux Falls property, as agreed, or at all; they did not make the payments called for by the contract, and refused to execute the new contracts. They attempted to cast all the burdens on the plaintiff, making it take all the risks involved, on both sides of the transaction. Without right to do so they entered into the possession of section 13, cropped it several years, there was a material increase in its value, and after this has occurred they seek to be relieved from compliance with the terms of their compact, and to hold plaintiff, not only to the conditions thereof, but to additional conditions or requirements which were never contemplated or provided for in the contract. To permit the defendants to maintain specific performance under such facts and circumstances would certainly afford them an advantage which no court of equity can permit, in the face of the objection of the other party.

As near as we can figure from the record, the defendants had the use of 1,450 cropped acres, and they broke, on the land, 480 acres. The trial court granted the plaintiff judgment for $3,000 for the use and occupation of this land. The evidence regarding its value is very unsatisfactory. Were it perfectly clear we should not assume to modify this judgment, but in the condition in which we find it we think this allowance is excessive, and that, taking the figures given as near as we can reach them, this judgment should be modified to the sum of $2,185, that being $2.50 per acre for the use of the cultivated land, with a credit of $3 per acre for the breaking. The District Court will modify the money judgment in accordance with these views, and when so modified it stands affirmed. Each party will pay its own costs on appeal.

BURKE, J., did not participate; J. A. COFFEY, Judge of the Fifth Judicial District, sitting in his place by request.

On Petition for Rehearing.

SPALDING, Ch. J. This court would have been more than justified in granting the motion made to strike out the statement of the case, appellants' abstract, and brief, for failure to conform in any material respect to the rules of this court. The original opinion was written with the idea that it would, however, be more satisfactory to both parties to have a decision on the merits than on a question of practice; and notwithstanding the fact that the failure to comply with the rules imposed upon this court much arduous labor, and rendered it extremely difficult to arrive at a determination of what questions were involved, counsel for appellant files a petition for a rehearing in which he, evidently relying on the incomplete abstract prepared by him, one which sets out only that part of the evidence which he apparently thinks favorable to his clients, states that this court has misstated the facts. Doubtless we did state facts which did not appear in his abstract. There are, however, two abstracts, neither one complete. We were compelled to reach the facts as best we could from the pleadings omitted from the original abstract, and from a search of the evidence as scattered without order through both incomplete abstracts. After spending nearly a week on a review of the record on the petition for rehearing, we are unable to discover that we materially misstated any fact. And what we say here is more in explanation of our holding than in stating any new or different propositions of law. While our opinions are not such as a case of this importance would seem to require, they are as elaborate as the brief of appellant and his specifications justify.

The defense was that the defendant Johnstone was entitled to specific performance of the contract, because plaintiff did not have title when the contract was made. Counsel suggests in his application for rehearing, for the first time, that appellant Johnstone had no knowledge of title not being in respondent when he executed the contract, but he made no specification on the subject. The evidence submitted by the defendants was very brief, and on this point we are not clear that it shows a lack of knowledge regarding respondent's title when the con-

tract was made, on the part of the defendant Johnstone. It certainly does not show that he relied on any representation made by the plaintiff on the subject. While defendant Johnstone himself testified that he was able, ready, and willing to carry out the contract, the pleadings and the evidence are to the effect that he could not do so by reason of the title to the Sioux Falls property being in the name of his wife, who, long before the trial, was adjudged insane, and remained so to the conclusion of the trial, if not so now. In words he repudiated the contract by refusing to carry out any of the terms which it imposed upon him, yet, after acquiring full knowledge as to the title, if he was not possessed of such knowledge when he executed the contract, and apparently without the knowledge or consent of respondent, its place of business being in St. Paul, Minnesota, he moved upon and proceeded to occupy and cultivate the land, thus repudiating the contract by word of mouth, but affirming it by act, refusing to accept those parts of it which were not in his favor, but at the same time insisting on reaping all the benefits which he contemplated obtaining under the contract.

As far as we are able to interpret the authorities cited by respondent, they are not in point; they are cases where the payment and delivery of deed were to be coincident, or where the contract had been made with reference to the condition of the title when entered into, or in which the vendor was not in position to acquire title. In the case at bar the time had not arrived for the delivery of title, and the conditions were fully explained to Johnstone before notice of cancelation was given. We may add to the facts originally stated that an officer of plaintiff made a trip from St. Paul to Beach a few days before such notice was given, and then restated to Johnstone the facts as to the title, and informed him of the conditions of its contract for title, and that he could get a deed on payment; that he told him they could let the matter rest no longer, and requested him to have the contracts executed; but that he refused absolutely to close the deal, and was then notified that steps would be taken at once to cancel the contract.

Much stress is laid upon the fact that Carrie Johnstone is insane and that her rights ought not to be litigated. The contract was not with her, but was with John Johnstone. However, if she had rights,

and is incompetent to litigate them, she is certainly incompetent to transfer the property which her husband contracted to convey.

As bearing on this case see: Easton v. Lockhart, 10 N. D. 181, 86 N. W. 697; Kulberg v. Georgia, 10 N. D. 461, 88 N. W. 87; Annis v. Burnham, 15 N. D. 577, 108 N. W. 549; Bennett v. Glaspell, 15 N. D. 245, 107 N. W. 45; Duluth Loan & Land Co. v. Klovdahl, 55 Minn. 341, 56 N. W. 1119; Provident Loan Trust Co. v. McIntosh, 68 Kan. 452, 75 Pac. 498, 1 Ann. Cas. 906; Trask v. Vinson, 20 Pick. 105; 2 Beach, Eq. Jur. § 611. The cases from 55 Minn. and 68 Kan. supra, are directly in point.

While we conclude that the petition for a rehearing must be denied, the money judgment should be further modified by making the allowance for breaking $3.50 per acre instead of $3, and while it appears that Johnstone never literally paid any taxes on section 13, he did purchase it at tax sale, on two or more occasions, and may have caused the taxes to be paid one year. The amount of his tax certificates, and such receipts for taxes as may be produced and show payment by him or Carrie Johnstone, with interest thereon at 7 per cent, will be deducted from the amount heretofore found due by this court, as will the 50 cents per acre for breaking.

AUGUST NADERHOFF, JR., v. GEO. BENZ & SONS.

(47 L.R.A.(N.S.) 853, 141 N. W. 501.)

Pleading — time for answer — security for costs — motion for.

Service of summons and verified complaint was made by service upon the secretary of state. Defendant appears by a motion to require of plaintiff security for costs, with hearing thereon noticed to be had three days after the expiration of the thirty-day period for answer, and defendant neglects to serve or file answer. On the 31st day after service of summons plaintiff files affidavit that defendant has defaulted and failed to answer or demur, but informs the court of the pending motion for security for costs. Judgment is ordered as of default without taking of testimony or the assessment of damages. The com-

Note.—The authorities on the question of the necessity of a jury to compute damages on default judgment are collated in a note in 20 L.R.A.(N.S.) 1.

plaint claimed to recover $1,527, alleged to have been paid defendant by plaintiff as the purchase price of intoxicating liquors delivered plaintiff at various times by defendant upon contract made and executed within this state. Plaintiff claims to recover as for money had and received under § 9390, Rev. Codes 1905. Soon after entry of the judgment by default, defendant applied to the court to vacate the judgment and permit answer, which motion was granted and from which plaintiff appeals. *Held:*—

(1) That the pendency of the motion to require of plaintiff security for costs did not operate to extend the time within which defendant must answer or demur; and that the judgment, if otherwise properly entered, is not irregularly entered because of the pendency of said motion.

Security for costs — rights of defendant — failure to timely answer — issue — jurisdiction.

(2) The right of defendant to exact security for costs ceased at the expiration of the period for answer, when no issue had been taken by answer or demurrer to the cause of action charged in the complaint, the motion not going to the jurisdiction over person or subject-matter.

Affidavit of merits—sufficiency—discretion—judgment—default.

(3) The proposed affidavit of merit stated insufficient facts to invoke the discretion of the court in an application to vacate the judgment made under § 6884. Rev. Codes 1905.

Intoxicating liquors — prohibition law — statutory penalty — contract.

(4) The cause of action sued upon, claiming under § 9390 a recovery for payments made for the purchase of intoxicating liquor sold and received in violation of our prohibition law, is an action upon an implied contract for the recovery of money had and received, and not to recover a statutory penalty. Judgment entered by default under the provisions of § 7001 was therefore entered in an action on contract within the meaning of the first subdivision of said section.

Default judgments — assessment of damages — proof — failure to answer.

(5) Sec. 7001, authorizing the entry of judgment by default without the necessity for an assessment of damages "in an action arising on contract for the recovery of money only," did not authorize entry of the judgment vacated without an assessment of damages. The portion of the statute "for the recovery of money only" does not apply to this judgment. Payments so made are not admitted by failure to answer.

Default judgments — contract — money — unliquidated amount — proof of damages.

(6) Judgment by default without assessment of damages, under this provision of the statute, can only be ordered in actions for the recovery of a definite sum of money as such, and wherein the court is not called upon to ascertain or adjudge anything but the existence and terms of the contract by which it is

due; and an action that requires the determination of amounts unliquidated is not to be deemed an action for the recovery of money only, as to relief sought. In such an action the amount of damages is not admitted by the defendant by a failure to answer, and an assessment of damages by the court is required.

Assessment of damages — notice — time — place — appearance.

(7) As the judgment was irregularly entered, in that damages were not assessed in a matter where assessment is required upon statutory notice to the opposite party after appearance, defendant was entitled to notice of time and place of such assessment of damages.

Judgment — notice — affidavit of merits — vacation of judgment.

(8) The judgment so being erroneously ordered and entered without assessment and without notice to the opposite party of time and place of assessment, an affidavit of merit is not essential, and the court, on motion of defendant, properly vacated said judgment thus irregularly entered.

Answer — extension of time.

(9) The court being obliged to vacate the judgment, properly permitted an extension of time to answer.

Opinion filed April 16, 1913.

An appeal from the District Court for Stark County, *Crawford,* J. Affirmed. Opinion by Goss, J., written after rehearing had.

Heffron & Baird, for appellant.

The pendency of a motion for security for costs does not operate to extend the thirty-day period, in which defendant must plead. Rev. Codes 1905, §§ 6853–7001–7336; Douglas v. Haberstro, 8 Abb. N. C. 230; Belknap v. Charlton, 25 Or. 41, 34 Pac. 758; Steinback v. Leese, 27 Cal. 295; Shinn v. Cummins, 65 Cal. 97, 3 Pac. 133; McDonald v. Swett, 76 Cal. 258, 18 Pac. 324; Greenfield v. Wallace, 1 Utah, 189; Loring v. Wittich, 16 Fla. 621.

The affidavit of merits is wholly insufficient in that it is made by the attorney, and not by defendant, without showing valid reasons therefor; that it is made on information and belief, and fails to state facts showing a meritorious defense. Kirschner v. Kirschner, 7 N. D. 291, 75 N. W. 252; Sargent v. Kindred, 5 N. D. 19, 63 N. W. 151; 1 Enc. Pl. & Pr. 360, and notes; 1 Black, Judgm. ¶ 347.

Wilful acts of omission on the part of defendant in failing to timely answer do not constitute "excusable neglect or mistake." Plano Mfg. Co. v. Murphy, 16 S. D. 380, 106 Am. St. Rep. 692, 92 N. W. 1072.

Where default is the result of purposely wilful acts, court will not vacate judgment. Bacon v. Mitchell, 14 N. D. 454, 4 L.R.A.(N.S.) 244, 106 N. W. 129; Hunt v. Swenson, 15 N. D. 512, 108 N. W. 41.

M. L. McBride (*L. A. Simpson,* of counsel), for respondent.

The order of the trial court in vacating a default judgment and allowing defendant to answer will not be disturbed, unless an abuse of discretion clearly appears. Barrie v. Northern Assur. Co. 99 Minn. 272, 109 N. W. 248; Potter v. Holmes, 74 Minn. 508, 77 N. W. 416; Nye v. Swan, 42 Minn. 243, 44 N. W. 9; Citizens' Nat. Bank v. Branden, 19 N. D. 489, 27 L.R.A.(N.S.) 858, 126 N. W. 102.

The defendant and his counsel acted promptly and in good faith, and any omission occurring was due to their excusable neglect and mistake. Bacon v. Mitchell, 14 N. D. 454, 4 L.R.A.(N.S.) 244, 106 N. W. 129.

The defendant's application and motion for security for costs brought him within the terms of the statute. The action should have been dismissed upon plaintiff's failure to furnish such security. Rev. Codes 1905, § 7198.

Defendant's motion for costs being pending, the court had no authority to enter a default judgment before acting upon such motion. Smalley v. Lassell, 26 S. D. 239, 128 N. W. 141; Braseth v. Bottineau County, 13 N. D. 344, 100 N. W. 1082; Brown v. Brown, 37 Minn. 128, 33 N. W. 546.

Demand for payment of the money should have been made, as a condition precedent to bringing the action, and such a cause of action must be supported by proof of the claim and assessment of damages. Oswald v. Moran, 8 N. D. 111, 77 N. W. 281; Rev. Codes 1905, § 7001.

Goss, J. This is an appeal from an order of the district court of Stark county vacating a default judgment taken by plaintiff against defendant corporation for $1,527, and costs and disbursements. Judgment was entered upon proof of service of summons and a verified complaint. The summons had been served upon defendant by service upon the secretary of state May 31, 1911. On June 23d, following, defendant appeared by its attorney in the action, and served a motion,

notice to be heard July 3d, moving dismissal of the action upon the ground that plaintiff was a nonresident of the state, and had not filed security for costs as required by law; and stating that the motion would be based upon all the files and upon an affidavit served therewith, and made upon positive knowledge that plaintiff was then, and had been for some time past, a resident of Glendive, Montana, and there engaged in the saloon business, and not a resident of the state of North Dakota. This affidavit and notice of motion was served upon the attorneys for plaintiff nine days before the time to appear, answer, or demur had expired. Said affidavit is not controverted. The affidavits filed in support of the motion to vacate the judgment further disclose that defendant's attorney had prepared and had ready for service an answer, stating a valid defense, together with a demand for a bill of particulars of the items constituting the cause of action sued upon, both of which are dated June 21st, the date of the service of the notice of motion for security for costs. It further appears that the motion would have been noticed for hearing at an earlier date had the district judge not been temporarily without his district, hearing causes at Mandan, in an adjoining district; that his wishes were consulted as to the time when the motion should be noticed for hearing, which was set accordingly for July 3d. That by inadvertence the demand for bill of particulars and answer prepared was not served upon the attorneys for plaintiff. That on July 1st, without notice to defendant's attorney, and promptly at the expiration of the thirty-day period for service of answer or demurrer, plaintiff's attorneys presented the summons and complaint with proof of service, together with an affidavit of default reciting that no answer or demurrer had been served upon them, to the district judge, who signed an order for judgment by default without the assessment of damages, and for the full amount for which judgment was asked in the complaint; upon which default judgment was entered by the clerk. On July 13th, defendant, upon an affidavit of merit made by said attorney, accompanied by an answer verified by him upon information and belief, moved to vacate this default judgment, bringing the same on for hearing on July 21st, at which time the motion was granted, with leave to answer upon the payment of $25 terms, which terms were tendered but refused. The grounds upon which the motion was made and presumably granted were, among

others, that there was a motion,—one to dismiss the above-entitled action, pending and duly noticed at the time that said judgment was entered; which motion, if it had been granted, would have prevented the entry of said judgment against defendant; and that the judgment as entered was taken without notice to defendant, though defendant had appeared in the action before the entry thereof. Also leave to vacate was asked upon the grounds set forth in the affidavit of merit of excusable neglect, inadvertence, and mistake of defendant in failing to serve answer previously prepared. From the order vacating the judgment this appeal is taken.

Defendant has, in all things since default judgment was entered, acted promptly. The motion to vacate the default judgment was seasonably made, noticed, heard, and decided. The motion challenged the power of the court to grant the judgment by default without assessment of damages, under § 7001, Rev. Codes 1905; also questioned the regularity of the entry of judgment while there was pending a motion that plaintiff give defendant security for costs, which if determined adversely to plaintiff would have stayed proceedings and might have resulted in the dismissal of the action, depending on the terms of the order for such security if granted. The motion to vacate covered additional grounds of excusable mistake and inadvertence on the part of the defendant in failure to answer, concerning which plaintiff challenges the sufficiency of the affidavit of merit to invoke the discretion and favor of the court, and on this appeal urges an abuse of discretion in vacating the judgment, if the same was vacated upon such grounds.

We will first decide the practice questions arising, the first of which concerns the regularity of the order for judgment on default made while defendant's motion that plaintiff give security for costs was pending, undisposed of and noticed to be heard three days after the time for answer or demurrer had expired, and in the absence of service of an answer or demurrer. Strange to say this court has hitherto declared no rule upon this question for this jurisdiction.

Respondent urges that the vacating of the judgment upon these grounds was not a matter of the invoking of the favor of the court, but, instead, a matter going to the regularity of its proceedings; that it was improper to enter the judgment with the motion pending, undisposed of. An examination of the statutes upon this question is here

in order. Assuming the court had power to enter the judgment without proof, § 7001 provides that the plaintiff, on default of the defendant in answer, could procure the judgment to be entered; § 6853 also provides that "the only pleading on the part of a defendant is either a demurrer or an answer," and that it must be served within thirty days after the service of a copy of the complaint; § 7336 declares that "when a defendant shall not have answered or demurred, service of notice or papers in the ordinary proceeding in an action need not be made upon him;" the first subdivision of § 7001 provides that "the plaintiff may file with the clerk proof of the personal service of the summons and complaint, . . . and that no answer or demurrer has been received," and thereupon judgment shall be entered for the amount demanded in the complaint, where the complaint is verified and the cause of action arises on contract for the recovery of money only. We will also take judicial notice that the usual practice in making the proof of default is by the affidavit of the attorney, reciting such service, and that no answer or demurrer to the complaint has been served upon or received by him. Under these provisions the motion made for security for costs, not being an answer or demurrer, is not, strictly speaking, a pleading. Under § 7321 a motion is defined as "an application for an order," in this case in writing and noticed for hearing, the decision of which under the provisions of §§ 7196–7198, if granted, might have terminated this action as effectually as if a defense had been pleaded and proven. And the only way, under our practice, defendant could avail himself of this right to security for costs at any time before judgment, was by motion, which when made was the assertion by him of the legal right in the manner prescribed by statute, and upon which he had a right to be heard at any time before judgment. But proper practice on defendant's part would have been to have answered or demurred or procured additional time within which to have plead after the ruling on the motion to dismiss for want of security for costs. The period for answer and demurrer expiring before the time at which the motion for security for costs was noticed for hearing and argument, the right of defendant to require of plaintiff such security lapsed and expired immediately when he became in default in answer. The right to security for costs is that defendant may recover his costs and disbursements assessable at law should his defense prevail or plaintiff's

cause of action fail, and to urge the right for such purposes he must be in a position to interpose a defense or question the right of plaintiff to prevail on the merits, which he cannot do when he is in default in answer or demurrer. In fact, until relieved therefrom, defendant's default confesses the truth of the complaint, where that is sufficient under the statute to warrant the entry of judgment without proof, as was here the case, provided this is a cause of action based upon contract for the recovery of money within the provisions of § 7001, Rev. Codes 1905, and assessment of damages before judgment was not necessary. The right of defendant to require security for costs, then, is dependent upon his being in position to exact the same, to do which he must not be in default in answer or demurrer as the case may be; and the rights under the motion itself, unaccompanied by answer or demurrer, expire with the right of defendant to interpose a defense by answer or demurrer, the only two methods provided by statute. The motion alone, without an order of court extending the time within which to answer or demur, is insufficient to toll the statute requiring answer or demurrer within thirty days from the service of the summons and complaint in this case served. We are aware that many decisions apparently to the contrary may be found, and that it would be easy, without weighing the decisions and the statutes and the practice prevailing in different jurisdictions, and by ignoring the real reason for the statute requiring security for costs, to come to the opposite conclusion. We may analyze a few of the many authorities touching the decision of this question. "Where a motion made by the defendant is pending undisposed of, a judgment by default against him cannot be taken unless the determination of the motion either way could not affect the right of the plaintiff to proceed with the cause." 6 Enc. Pl. & Pr. 93, and cases cited. The cases cited to support this text are: Dillon v. Rand, 15 Colo. 372, 25 Pac. 185; Atchison, T. & S. F. R. Co. v. Nicholls, 8 Colo. 188, 6 Pac. 512; Chivington v. Colorado Springs Co. 9 Colo. 597, 14 Pac. 212; Klemm v. Dewes, 28 Ill. 317; Kinyon v. Palmer, 20 Iowa, 138; and Phillips v. Kerr, 26 Ill. 213. To which we may add The Osprey v. Jenkins, 9 Mo. 644; Beasley v. Cooper, 42 Iowa, 542; Mattoon v. Hinkley, 33 Ill. 209; Dudley v. White, 44 Fla. 264, 31 So. 830; and Register v. Pringle Bros. 58 Fla. 355, 50 So. 584. The above cases and the text writer's conclusions therefrom are dis-

tinguishable from the issue here involved on this motion for security for costs. The Colorado, Illinois, Florida, and Iowa statutes in terms recognize a motion pending as staying the right to a default judgment until such motion is disposed of. Section 149 of the Colorado Civil Code prior to 1885 expressly provided that notice of motion is equal to demurrer or answer in preventing a default. "This statute, prior to amendment in 1885, was imperative; upon motion to dismiss for want of cost bond the court had no discretion in the matter, and must sustain the motion. Edgar Gold & S. Min. Co. v. Taylor, 10 Colo. 112, 14 Pac. 113; Western U. Teleg. Co. v. Graham, 1 Colo. 183; Talpey v. Doane, 2 Colo. 299; Filley v. Cody, 3 Colo. 221." See note to § 675, Mills's Anno. Stat. (Colo.) 1891. The Illinois statute, Starr & C. Anno. Stat. 1896, vol. 3, page 3027, § 39, provides for a default judgment for want of appearance at the term of court, that state continuing the old common-law practice of pleadings being filed at or during the term; and there having been an appearance and motion, there was no default. The Iowa statute, Code of 1897, §§ 3550 to 3557, are substantially the same as those of Illinois, and in terms make a motion a pleading, and as we infer operate to prevent judgment by default with a motion pending. Likewise, § 1422 of the Florida Code provides that "if the defendant shall fail to appear," "plead or demur," "the plaintiff may cause a default to be entered." The Missouri case, The Osprey v. Jenkins, was evidently announced under a rule of practice, as a different rule now prevails in that state, as appears from Fears v. Riley, 148 Mo. 49, 49 S. W. 836, where that court says: "Taking a judgment while a motion for security for costs was pending was not a fraud upon the court, for the court takes judicial notice of the state of a case as shown by its own records. Only a motion going to the merits dispenses with the necessity of answering." Citing Hill v. Meyer, 47 Mo. 585. We have also examined the following cases, none of which are applicable to a motion of this kind: Cooper v. Condon, 15 Kan. 572, involving the removal of a cause to the Federal courts and thereby a question of jurisdiction in the state court to proceed; 34 Cyc. 1306, note 24; Hosmer v. Hoitt, 161 Mass. 173, 36 N. E. 835, decided under a rule of court on suggestion of insolvency, and holding a case not "ripe for judgment" where such has been made; Woods v. Woods, 16 Minn. 81, Gil. 69, in which a stipulation of parties submitting a notice

to substitute defendants caused delay in answer, which under the facts was held excusable neglect; and the decision in Smalley v. Lasell, 26 S. D. 239, 128 N. W. 141, was really based upon grounds of excusable neglect, instead of the pendency of a motion, as one portion of the syllabus would indicate, the court considering the affidavit of merits. Nor do we consider General Lithographing & Printing Co. v. American Trust Co. 55 Wash. 401, 104 Pac. 608, applicable, as the facts are not similar.

The following authorities support our conclusions, apparently independent of statute and under Code provisions similar to ours: Pilant v. S. Hirsch & Co. 14 N. M. 11, 88 Pac. 1129; McDonald v. Swett, 76 Cal. 257, 18 Pac. 324, following Shinn v. Cummins, 65 Cal. 97, 3 Pac. 133, although the reasoning of the California case is brief and unsatisfactory. For a holding directly in point, see Higley v. Pollock, 21 Nev. 198, 27 Pac. 895. See also Mantle v. Casey, 31 Mont. 408, 78 Pac. 591; Garvie v. Greene, 9 S. D. 608, 70 N. W. 847; Greenfield v. Wallace, 1 Utah, 189; Gipson v. Williams, — Tex. Civ. App. —, 27 S. W. 824; International & G. N. R. Co. v. Williams, 82 Tex. 342, 18 S. W. 700.

For the foregoing reasons, and on an analysis of the authorities, we decide that the pendency of this motion for security for costs undisposed of would not, of itself, extend the time within which defendant was obliged to answer or demur, or stand in default thereof; and when he is so in default because of his failure to present an issue on the merits, thereby conceding the merit of plaintiff's cause of action and his right of recovery, a defendant, then, has no right to ask or be heard to insist upon security for costs, when, under every presumption, plaintiff is then entitled to judgment against him, and defendant would be asking for something which could avail him nothing, and for something concerning which he then could have no rights, having waived his defense by failure to plead or demur. When the reason for requirement of an order ceases, the right thereto, which otherwise might be available to a defendant, should cease with it. There was no error, then, in granting judgment with this pending motion undisposed of. Our holding is not authority concerning a pending motion invoking a question of jurisdiction, the motion for security for costs not raising jurisdictional questions.

We now take up the second practice question, concerning the propriety of the order vacating the judgment on the grounds of excusable neglect, under the showing based upon the affidavit of merits, proposed answer, and the other files in the case. The affidavit of merit is made by defendant's attorney. It is accompanied by an answer subscribed by said attorney and verified by him on information and belief, with an accompanying demand for bill of particulars of plaintiff's cause of action. The part of the affidavit of merit material to the present inquiry reads: "That your affiant for and on behalf of said defendant most respectfully prays this court for an order vacating and annulling said judgment hereinbefore referred to, and that the defendant be allowed to answer in the above-entitled action, a copy of which answer is hereto annexed, together with a demand for a bill of particulars upon the following grounds: Upon the ground of excusable neglect by mistake, in that on the 11th day of June, 1911, your affiant received a copy of the pleadings served on the defendant, together with the information to make an answer; from such information affiant informed the defendants that they had a good and meritorious defense to said action to plaintiff's complaint herein, and affiant now states the same to this court, as is further shown by the answer of the defendant herein, which is especially referred to and made a part of this affidavit; that on the 21st day of June, 1911, your affiant prepared the demand for a bill of particulars, together with the answer, and also a motion to dismiss the action of plaintiff on the ground and for the reason that said plaintiff was a nonresident of the state of North Dakota; that no security for costs had been furnished, and therefore asked that said action be dismissed; that it was known to your affiant at that time that the judge of this court was in court at Mandan, North Dakota, busily engaged, and in conversation with said judge in the fore part of June, 1911, said judge stated to this affiant that he would like to be consulted upon the dates for motions, especially during the summer months; that affiant expected to see and talk with said judge in time to make the motion for security for costs returnable before the time for answering expired," "and made the motion returnable on the first day of July, 1911, on which day the time for answering expired; but that affiant did not see the judge of the court, as he was still at Mandan, and after two days your affiant was obliged to set the motion returnable on the 3d day of

July, 1911, in order to give the attorneys for the plaintiff the eight days' notice, of which they were entitled; that on the 3d day of July, 1911, your affiant was called into consultation on a criminal case in Dunn county, and was very busily engaged all of said day, and that your affiant completely forgot that he had a hearing on said motion set on the 3d day of July, 1911; that plaintiff's attorneys, ignoring the fact that defendant had made appearance in said action, made an application to this court for a default judgment and secured an order on July 1, 1911, for a judgment against this defendant as prayed for in plaintiff's complaint; that the attorney for the defendant was relying upon his motion, and if said motion were granted said action would have been dismissed, and that unless said security for costs were furnished the court herein would be without jurisdiction, as the plaintiff is not a resident of the state of North Dakota." The answer in brief is a general denial, accompanied with a statement that "the goods (intoxicating liquors) sold and delivered and referred to in plaintiff's complaint were sold and delivered in the state of Minnesota," with a demand for dismissal of the action, and verified on the information and belief of the attorney. The affidavit of merit fails to state that the attorney for the defense has been informed fully and fairly of all the facts in the case, and that therefrom he believes defendant has a meritorious defense; nor are any facts concerning said defense recited, except in the answer, and there on the information and belief of the attorney alone. The attorney subscribing the affidavit and answer could truthfully swear to everything contained in both affidavit and answer, and still there exist absolutely no defense to the cause of action herein recited. It does not appear that he has been told all the facts in the case; in fact, that he has been told any facts in the case does not affirmatively and plainly appear. All the information he received from his client, as appears from the affidavit of merit, is that to be inferred from the indefinite statement "that your affiant received a copy of the pleadings served on the defendant, together with the information to make an answer; from such information affiant informed said defendants that they had a good and meritorious defense to said action, and now states the same to the court, as is further shown by the answer of the defendant herein, which is herein specifically referred to and made a part of this affidavit." Nor does the reason appear why someone familiar with the facts does not,

on positive knowledge under affidavit, disclose the facts of the defense to the court, that it may therefrom, in the exercise of its discretion upon the facts disclosed, determine whether a meritorious defense exists, and determine whether the judgment should be vacated to allow trial of the issues so presented. We are not now dealing with a matter to which defendant is entitled as of right, but rather the question of whether the court in its discretion will favor him by vacating judgment against him and allowing him a day in court after he has, by failure to answer or demur, waived the same. The first essential to invoke the court's discretion is a showing of merit in his defense, to do which is the office of the affidavit of merit with accompanying answer. The merit of the defense must affirmatively appear and be set forth by someone, either attorney or client, in such a manner and with such accompanying explanation as shall satisfy the court that the party so asserting the facts of the defense, from which their merit is to be determined, either knows the facts, or has sufficient knowledge of them to satisfy the court that there is real merit in the defense, and that the allowance thereof would not result merely in delay in the final judgment to be entered, and merely to delay plaintiff in the collection of his claim already in judgment. Weighed by all rules, the affidavit of merit with the answer considered is wholly insufficient as such to invoke the discretion of the court. Without the merit of the defense being shown, the court cannot consider the fact that this judgment was taken by default while a motion relied upon by attorney for defendant to extend the time for answer was pending undisposed of. We do not decide that this could not be considered as an element of the circumstances of the case had the defendant established in his affidavit of merit a prima facie meritorious defense, invoking the favor or discretion of the court for relief. Manifestly, then, the judgment cannot be vacated on the grounds of excusable neglect.

This takes us to the third ground of the motion, that of the right of the court to order the entry of this judgment under § 7001, Rev. Codes 1905, without the assessment of damages. Two questions are here presented for decision: First, whether the general appearance by motion made by the attorney for the defendant made it necessary to notify him of the time and place of the assessment of damages, and not to assess the same until he was so noticed; and, second, whether the claim

sued upon in this case, being a right of action given by § 9390, Rev. Codes 1905, to purchasers of intoxicating liquors within the state to recover after demand therefor of the seller the purchase price for such liquors, gives rise to a demand arising upon contract within the meaning of § 7001, authorizing judgment by default in actions upon demands arising on contract for the recovery of money only. Is this such a claim? If not, judgment by default should be set aside on motion without the interposition of an affidavit of merit, and regardless of the merits of the case, as its entry would be irregular and in disregard of the statute requiring the assessment of damages.

As to the first question under § 7336, the appearance made did not necessitate notice before the taking of default judgment, the complaint being verified, unless the action be one not "arising on contract" or not "for the recovery of money only." As to whether the cause of action here sued upon, based upon the provisions of § 9390, Rev. Codes 1905, is a cause of action based upon contract, it becomes necessary to decide. Section 9390 provides: "All payments and compensation for intoxicating liquors sold in violation of this chapter, whether such payments or compensation is in money, goods, land, labor, or anything else whatsoever, shall be held to have been received in violation of law and against equity and good conscience, and to have been received upon a valid promise and agreement of the receiver in consideration of the receipt thereof to pay on demand to the person furnishing such consideration the amount of said money or the just value of such goods and labor or other things." Several states have had similar statutes. Ours, wherever obtained, is nearly a literal copy of Iowa and Vermont statutes in force at the time of the adoption of this Code provision. See § 2423, Iowa Code of 1897, and General Statutes of Vermont of 1863, chap. 34, § 32. We can answer this inquiry in the language of the decisions of those states construing practically our own statute. In Foley v. Leisy Brewing Co. 116 Iowa, 176, 89 N. W. 230, from page 231, we quote: "It is argued on plaintiff's behalf that Ill was a participant in a scheme to enable plaintiff to violate the law. But this is not an action in tort; it arises out of a statutory contract,—that is, a contract which the statute says shall be implied from certain facts,—and is covered by the ordinary rules relating to actions on contracts. It is not the participation in making the sale, nor the handling of money that

could make Ill a joint principal, but only the receipt by him as his own of a part of the purchase price" of liquors sold in violation of law for which recovery of the purchase price was sought. The Vermont courts first held to the theory that this statute gave a right of action for penalty for an illegal sale, holding, in the language of Thayer v. Partridge, 47 Vt. 423, on page 428 of the opinion, that "the right of action is given by way of penalty for the illegal sale, and is analogous to the right of a borrower to sue for usury paid and for the right to sue for money lost at play. It is a part of the machinery for enforcing the liquor law, and is essentially penal in its aim and in its nature. It is in no sense 'founded in contract,' but arises solely from the violation of law." But a later decision, Laport v. Bacon, 48 Vt. 176, overrules Thayer v. Partridge, supra. We quote: "The statute for recovering back compensation paid for liquor sold in violation of law provides that all such compensation 'shall be held and considered to have been received in violation of law, without consideration, and against law, equity, and good conscience; and may, in an appropriate action, be recovered back, it being alleged in the declaration that the money, labor, or personal property so held was received and is held to the use of the plaintiff.' This action is upon the common count in assumpsit, and it is urged that such compensation cannot be recovered back in that form of action. But the action of assumpsit has always been considered to be an equitable action by which a plaintiff might recover money which a defendant held and in equity and good conscience ought not to retain. And as the statute declares all such payments to have been received without consideration, and against equity and good conscience, it would seem to be plain that the action of assumpsit would be a very appropriate action by which to recover back the payments; and when received in money, that the common counts would likewise be appropriate. . . . Then, again, this action is to recover what by force of the statute had always been the plaintiff's, and, although in form delivered in payment, had never become the defendant's, and is not penal but is remedial." And the later case, decided in 1892, of Yearteau v. Bacon, 65 Vt. 516, 27 Atl. 198, expressly disapproves the portion of the holding quoted from Thayer v. Partridge, supra, and follows Laport v. Bacon, supra. The question involved in Yearteau v. Bacon was the identical question here considered, and, under the statute above quoted, practically iden-

tical with § 9330 under consideration. It arose in an action brought against an estate to recover money paid to the deceased in his lifetime for intoxicating liquors unlawfully sold; and it was urged that the statute giving a right of action for recovery of such payments was penal in nature, and not contractual, and hence there was no survival of action against the estate. From page 527 we quote: "The case is clearly within the test applied at common law to determine whether a demand survives. The rule is that the cause of action survives against the estate whenever the estate has received a benefit from the transaction for which a recovery may be had by an action in form *ex contractu*. . . . Money which the statute declares to belong to the plaintiff, and to be recoverable in an action for money had and received, is in the assets of this estate. If the money is the plaintiff's, the death of its possessor cannot have deprived him of the right to recover it. . . . The statute provides that one who makes a payment for liquor sold in violation of law may recover it back as money received and held to his use. . . . It was the purpose of the legislature to load the traffic in all its stages with danger and uncertainty, leave every seller at the mercy of the buyer, and deprive wealth thus obtained of that security which is the great incentive to legitimate trade." Then, again, concerning Thayer v. Partridge, supra, the court, on page 526, says: "In the opinion the statute authorizing the recovery of money so paid is spoken of as essentially penal in its nature and aim. But in Laport v. Bacon, 48 Vt. 176, a different view is expressed. There the plaintiff sought to recover money paid for liquor unlawfully sold in an action of general assumpsit, and the trial was by referee. It was contended that a claim of this nature could not be recovered under the common counts. The court held that the money was recoverable on the count for money had and received; but said further that the action was not penal but remedial, and that the declaration could have been amended. And in the unreported case of Pecker v. Barney, held at the general term in 1879, a decision was rendered which could not have been arrived at without adopting the view expressed in Laport v. Bacon. The defendant in that case sought to recover under a plea in off-set money paid to the plaintiffs for liquor sold in violation of law. Nothing could be recovered in offset except an indebtedness on contract express or implied; plaintiff's counsel insisted that the defendant's cause of action was not a demand resting in

contract, but a right covered by the statute for a penal purpose, and cited Thayer v. Partridge in support of his claim. But the defendant had judgment in offset."

The foregoing, on all fours with the facts and under the contentions here made, are decisive of the contract feature of this case. The reasoning of the Vermont court is unanswerable. We must comply with the statute, § 9390, where in the most mandatory language it says that this money sued for "shall be held to have been received in violation of law . . . and to have been received upon a valid promise and agreement of the receiver" to repay upon demand to this plaintiff. The statute makes the money so paid the defendant by plaintiff at all times the property of the plaintiff, to be repaid him upon his demand therefor. We might cite here the only two North Dakota holdings on this statute,—Oswald v. Moran, 8 N. D. 111, 77 N. W. 281, holding demand prior to suit by way of counterclaim necessary, and Frankel v. Hillier, 16 N. D. 387, 113 N. W. 1067, 15 Ann. Cas. 265, concerning pleading and proof and place of sale involved in an action to recover the purchase price of liquors alleged to have been unlawfully sold. Consult also 23 Cyc. 343, 344, wherein the author of Black on Intoxicating Liquors lays down the following rule, here applicable: "But in several states statutes have been enacted providing that all payments for liquors sold illegally shall be held to have been received in violation of law and against equity and good conscience, and to have been received upon a valid promise and agreement to repay the same upon demand." . . . "An action on a statute of this character is an action of contract, and not in tort; and where the common-law system of pleading prevails the proper form of action is assumpsit as for money had and received. The claim for money paid on such an illegal sale may also be pleaded as a set-off or counterclaim in cases where such a plea would otherwise be permissible." Citing Schober v. Rosenfield, 75 Iowa, 455, 39 N. W. 706; Friend v. Dunks, 37 Mich. 25; Tolman v. Johnson, 43 Iowa, 127; Roethke v. Philip Best Brewing Co. 33 Mich. 340; Delahaye v. Heitkemper, 16 Neb. 475, 20 N. W. 385; Gorman v. Keough, 22 R. I. 47, 46 Atl. 37.

But is this an action, though on contract, one "for the recovery of money only" within § 7001? With a cause of action *ex contractu* existing by force of statute, upon admission or proof being made of the

illegal sales, does it follow that after defendant has appeared by motion, the court can, under the provisions of § 7001, Rev. Codes 1905, enter judgment without notice and without assessment of damages for the demand claimed in the complaint, as "in an action arising on contract for the recovery of money only?" The question of necessity of notice to the defendant, like the power of the court to enter the judgment without assessment of damages, depends upon the meaning of the statute prescribing that judgment may be so entered where the complaint is verified "in an action arising on contract for the recovery of money only."

Section 7001, Rev. Codes 1905, is identical with § 5025, Compiled Laws of 1887. Subdivision 1 of both statutes concerns the entry of judgment for money only; subdivision 2 of both for the entry of judgment for relief other than money. This distinction was carried into this statute from those prescribing the forms of the summons. See Compiled Laws, § 4894, the first subdivision of which required the insertion of a notice in the summons that a judgment would be taken for a sum specified therein if the action be one "arising on contract for the recovery of money only." And the second subdivision provided that the summons should contain a notice that in other actions the court would be applied to for the relief demanded in the complaint. The phraseology in the money demand form of summons and the statutory provision for entry of judgment thereon is identical, in each case, being "in an action arising on contract for the recovery of money only." In the revision of 1895 the distinction between the relief and money demand form of summons was abolished, as appears from § 5248, Rev. Codes 1895, our present § 6834, Rev. Codes 1905. But no change was made in the corresponding judgment statute. What constitutes "an action arising on contract for the recovery of money only," within the meaning of these statutes? That must now be held to have the same meaning as when used prior to 1895. Turning to the New York practice acts, we find identical provisions as to both form of summons and entry of judgment thereunder; and the courts of that state in 1857 settled the very question before us in the determination of the form of the summons to be used "in actions arising on contract for the recovery of money only." See §§ 129 and 246 of the New York Code of Procedure, construed in the thoroughly considered case of Tuttle v. Smith,

6 Abb. Pr. 329, 14 How. Pr. 395; and followed in these cases: People v. Bennett, 6 Abb. Pr. 343; Salters v. Ralph, 15 Abb. Pr. 273; Luling v. Stanton, 8 Abb. Pr. 378; Cobb v. Dunkin, 19 How. Pr. 164; Norton v. Cary, 14 Abb. Pr. 364, 23 How. Pr. 469; Garrison v. Carr, 3 Abb. Pr. N. S. 266, 34 How. Pr. 187; Travis v. Tobias, 7 How. Pr. 90. And for a construction of § 4894 of the Compiled Laws on the form of summons, see St. Paul Harvester Co. v. Forbreg, 2 S. D. 356, 50 N. W. 628, citing and following Brown v. Eaton, 37 How. Pr. 325. See also Searles v. Lawrence, 8 S. D. 11, 65 N. W. 34. As the subdivisions of our present § 7001 were framed to conform to the relief required to be demanded under the prescribed forms of summons, the holdings interpreting the form of the summons apply equally to the phraseology of the statute as to judgments, and are usually considered together. Concerning this we quote the following from Tuttle v. Smith, supra: "The phrase 'for the recovery of money only' ought not to be considered as marking a class of cases which are distinguished only from actions brought to compel performance of some specific act or thing, and terminating there. Such a classification evidently would be insufficient. There are many cases where specific relief is to be administered, and yet the ultimate object of the suit is the recovery of money. Such are foreclosure suits, and suits for the administration of assets and the payment of legacies. These are suits for the recovery of money only, and not of any specific thing, and yet requiring specific relief, and an application to the court to obtain ultimately the money for which the suit is brought. These are confessedly included among the actions referred to in the second subdivision. [Concerning actions for relief only.] Yet they are actions founded on contract, and brought for the recovery of nothing but money, not of land, nor of chattels, nor any specific right or thing.

The phrase in question must be construed to mean the recovery of a definite sum of money as such, and without calling upon the court to ascertain or adjudge anything but the existence and terms of the contract by which it is due. Whenever the action requires the determination of amounts unliquidated, in their nature requiring other proof, and depending upon other considerations than such as appear in the contract itself, then the action is not for the recovery of money only, as money due and payable by the contract on which the action arises. It

is rather an action to establish and ascertain the plaintiff's right to damages, which are to be paid and satisfied in money. It may be said that this is a refined construction of the statute. Undoubtedly it is, but it is necessary to resort to it to prevent the most absurd as well as iniquitous results."

The opinion then states that the judgment is to be entered by the clerk without an order, and comments upon the absurdity of the statute being intended to cover all cases in which a money judgment may be entered, as contended for. Continuing it says: "Can it be said that the proof of facts is not necessary to enable the court to give judgment in a case like the present, brought to recover unliquidated damages for the breach or breaches of an agreement, requiring many specific acts in carrying on a business which was jointly undertaken by the parties? On the defendant's default, the contract and its breach, and that the plaintiff is entitled to damages, are indeed admitted; but it is impossible that their amount should be stated with precision, or admitted by a failure to answer, so that the court, acting through its clerk, can justly be said to have before it all the facts necessary to enable it to give judgment. The extent of the injury, or the amount of damages, is matter of judgment or legal discretion, depending on extrinsic facts. It may be stated first in the complaint in round numbers, according to the claim and opinion of the plaintiff; but it must be determined upon evidence or the proof of facts, which cannot be pleaded, but must be exhibited to the court, to enable it to make any clear, not to say just, disposition of the matter."

Then, again, we read the following from page 333 of the opinion:

"Take the case of an action by a female for the breach of promise of marriage, where the excited feelings or fancy of the plaintiff would induce her not only to state but to swear to almost any amount of damages. This has been held, and if I am wrong in the construction I have adopted, it undoubtedly is, one of the class described in this section as 'actions on contract for the recovery of money only,' and the plaintiff may therefore give notice in the summons, that if no answer is put in, she will take judgment for the amount claimed as damages in the complaint. Now, if the complaint be verified, and it be true there was a contract and a breach, and the defendant be too conscientious to deny it under oath, what is he to do? Is it not very doubtful whether

a mere denial of the allegation that the plaintiff is damaged five or ten thousand dollars, as the case may be, would be good pleading, or would form any issue? And if such an answer were struck out, or if the defendant wished to be spared the expense and the exposure of a defense and a trial, and therefore made default, the plaintiff must have judgment for the whole amount of damages she claims, without the defendant ever having been allowed any opportunity to try the question of damages in any way. A construction of the Code which would lead to such consequences, . . . if its design and effect be what its admirers claim." And the decision, as evidenced from the syllabus, holds that this language must be interpreted as applying only to "actions for the recovery of a definite sum of money as such, and without calling upon the court to ascertain or adjudge anything but the existence and terms of the contract by which it is due; and an action that requires the determination of amounts unliquidated, in their nature requiring other proof and depending upon other considerations than such as appear in the contract itself, is not to be deemed an action for the recovery of money only, but rather an action to establish and ascertain the plaintiff's right to damages, which are to be paid in money;" in which event "the amount of damages is not admitted by the defendant by a failure to answer," and assessment of damages by the court is required.

Proceedings and practice in the entry of judgment and assessment of damages, and necessity therefor, in practically all the states, are governed by statutory provisions. They may be found collected in a lengthy note to State ex rel. Spratlin v. Thompson, 20 L.R.A.(N.S.) 1–35. And the rule of each jurisdiction depends largely upon the construction of the particular statute. That our statute is taken from § 246 of the Code of Procedure of New York, prior to its amendment in 1877, has been decided by our sister state of South Dakota in Searles v. Lawrence, 8 S. D. 11, 65 N. W. 34. See also for 1877 amendment to former procedure, § 420 and annotations to Stovers New York Code of Civil Procedure of 1893, and § 420 of Waits New York Code of 1880. And again, the damages here claimed are not liquidated, but purport to consist of various payments on account for goods received, but which goods, because of their contraband nature, if the sale was made within this state, can constitute no valid consideration for the payments so made and sought to be recovered.

"Generally, a final judgment cannot be entered where the damages are unliquidated or the amount of plaintiff's claim uncertain or indeterminate. . . . The final judgment is entered after the damages have been assessed on a writ of inquiry or otherwise determined according to law." 23 Cyc. 765, ¶ 7.

"As a general rule a default admits the cause of action and the material and traversable allegations of the declaration, although not the amount of damages; and hence, the amount to be recovered is all plaintiff is required to prove or defendant permitted to controvert. There are, however, numerous decisions disapproving of the entry of such a judgment without proof of the facts essential to plaintiff's recovery, chiefly, however, in cases where the action is for unliquidated damages, or based upon a condition or contingency." 23 Cyc. 761.

To the same effect, see 6 Enc. Pl. & Pr. 116: "Where the facts pleaded constitute a cause of action the effect of the default is to establish it definitely." "All matters well pleaded and essential to the judgment" are admitted. "But the defendant's default does not admit plaintiff's allegations of value or amount." These are to be proven before judgment can be taken. 6 Enc. Pl. & Pr. 128. "And the burden of proof as to the amount for which judgment by default shall be taken rests upon the plaintiff" [p. 129] except in cases provided by statute to the contrary, as where judgment is authorized to be ordered for the amount evidenced by a promissory note or other written instrument, by its production proving on its face the amount for which judgment may be taken.

This action is properly brought as upon a complaint for money had and received upon an implied contract created by special statute, § 9390. 27 Cyc. 870 et seq.; Logan v. Freerks, 14 N. D. 127, 103 N. W. 426; and cases found in 35 Century Dig., title "Money Received," § 49, and 13 Century Dig. title "Money Received," § 6. As we construe § 7001, Rev. Codes 1905, the amount for which judgment could be entered was not admitted by default in answer, granting that all other allegations of the complaint were so admitted. That statute contemplates that proof shall be made in all instances where the complaint is unverified, and where verified in all instances except where the contract by its terms makes proof of the amount of recovery, as for instance, a promissory note or similar contract establishing, when considered with the

matters admitted by the default, a liability and the specific amount thereof. This action for money had and received, based upon numerous payments at various times, is parallel in such respect to an action to recover for goods sold on account, in which case the assessment of damages is necessary before entering of judgment in default of answer. 6 Enc. Pl. & Pr. 134. And we are satisfied this holding is in conformity with the uniform practice heretofore followed in this state. We may remark that such proof may be made by testimony by deposition or by affidavit showing the facts, inasmuch as where the defendant is in default the court may in its discretion consider an affidavit as proof. The affidavit of costs and disbursements is insufficient to constitute the proof of claim required on which to assess damages.

This judgment, entered by default without an assessment of damages, or without evidence to sustain it as to amount, was irregularly entered, and was properly set aside on motion based upon those grounds. And after the judgment was vacated it was then within the sound discretion of the court to grant relief to defendant from default in answer, to do which an affidavit of merit was unnecessary, as the rights of the parties were not yet adjudged and the application to then answer would be considered, regardless of the merits of the suit, as an application to plead after time. Concerning this it appears that the reason why the answer was not served was solely because of the inadvertence and mistake of defendant's attorney. If authority on this question is needed, we cite Salters v. Ralph, 15 Abb. Pr. 273, directly in point on practice.

Defendant has argued that even though the action be one arising upon contract for the recovery of money only, with a verified complaint, judgment could not be entered without notice of the assessment of damages, inasmuch as defendant had entered a general appearance. But in this defendant is in error. Had the action been one on contract, as to basis of action, and for the recovery of money only, as to relief, judgment could have been entered without notice, regardless of his appearance, defendant standing in default of demurrer or answer, or of motion going to the jurisdiction of, court or subject-matter. We quote from the syllabus of Dix v. Palmer, 5 How. Pr. 233:

"Where the defendant has appeared but not answered in an action for the recovery of money only, and the complaint is duly verified, he is not entitled to notice of assessment. In such case there is no assess-

ment,—judgment is entered of course." And from Southworth v. Curtis, 6 How. Pr. 271:

"A notice of assessment to the defendant in an action on contract for the recovery of money only, under § 246, is not necessary where the complaint is properly verified." And such must be the only conclusion to be arrived at from a careful reading of the first subdivision of § 7001.

After rehearing had in this action, we adhere to our decision that the trial court properly vacated a default judgment entered, and its order is affirmed, with costs.

SPALDING, Ch. J. I concur in the result.

BRUCE, J. I concur in the result generally, but not in that part of the opinion covered by paragraphs 1 and 2 of the syllabus.

NELLIE SHANE et al. v. H. PEOPLES.

(141 N. W. 737.)

Statute of limitations — pleading — demurrer.

1. The running of the statute of limitations cannot be raised by demurrer, but must be pleaded in the answer. This is the case in North Dakota under § 6770, Rev. Codes 1905, even though the fact is apparent upon the face of the complaint.

Judgment — collateral attack — jurisdiction — process — service of.

2. To subject the judgment of a county court to collateral attack, the absence of jurisdiction must appear on the face of the judgment; and though the record may be irregular and defective, the judgment, if valid upon its face, is not as a rule subject to collateral attack. It is not sufficient, to overcome the presumption in favor of the jurisdiction of the court, for the person who seeks to avoid its consequences to merely allege that he had no legal notice of the pendency of the action in which it was rendered. Such person must allege what, if anything, was shown by the record in relation to the issue and service of process therein.

Note.—The authorities on the question what is collateral attack are reviewed in notes in 5 Am. St. Rep. 453, and 23 Am. St. Rep. 104.

Presumption — courts — judgments.

3. A court, on collateral attack, will be presumed to have done its duty, and this includes the presumption that all parties affected by said judgment and decree were properly before it.

Action to quiet title — decree — sale under — collateral attack.

4. An attempt to have declared void a sale made by the administrator of an estate, and the decree of the county court authorizing and ratifying the same, even though made in the form of an action to quiet title, is a collateral attack upon said sale and said decree.

Administrator — real property — sale — proceedings in rem.

5. The proceedings leading up to the sale of real estate by the administrator of the estate of an intestate, under the authorization of the county court, is a proceeding *in rem*.

County court — heirship — presumption.

6. Where a petition is filed in a county court by one of the heirs-at-law, which states that he is the sole and only heir-at-law, the court, in a collateral attack upon such proceeding by one who claims to have been an heir, and not to have been made a party to, or cited to appear in, such proceedings, there is a legal presumption that the county court passed upon the question of heirship.

Judgment — pleading — notice.

7. In a collateral attack upon a judgment of a county court and sale thereunder, it is not sufficient to allege that the party seeking to avoid it had not been served with notice or made a party thereto. The allegation should have been that there was not in fact such notice, and the record of the judgment did not show such fact.

County court — jurisdiction — petition.

8. The jurisdiction of a county court to administer an estate is conferred by the petition, and if the petition is, on its face, regular and a judgment is entered or a decree rendered in conformity therewith, jurisdiction will be presumed on a collateral attack.

Fraud — sale — proof.

9. Even where fraud is alleged in the presentment of such a petition, a sale thereunder will not be set aside without an allegation and proof that the purchaser at such sale was a party to such fraud.

Opinion filed April 22, 1913.

Appeal from the District Court for Wells County, *Burke*, J.

Action in equity to quiet title to real property and have declared void an administrator's sale thereof, alleged to have been fraudulently

procured. From an order sustaining a demurrer to the complaint and directing the entry of judgment for defendant, plaintiffs appeal.

Affirmed.

This is an appeal from an order sustaining a demurrer to a complaint and from a judgment dismissing an action. The demurrer not only attacks the complaint for lack of equity, but insists that the district court has no jurisdiction of the subject-matter. The action is in form one to quiet title to real estate, and its main purpose is to have set aside a conveyance of land to the defendant and respondent, Peoples, which was made on the 9th day of March, 1900, by the administrator of the estate of William Shane, deceased, under and by virtue of a proceeding which the plaintiffs allege to have been instituted in fraud of their ancestors and without notice to them. The action is brought by the children of two of the heirs-at-law of the deceased, their parents, in the *interim,* having also died. The contention is that the administration under which the real estate was sold to the defendant and respondent was procured by one Margaret Shane Dunton, who, it is alleged, fraudulently represented to the court that she was the sister and only heir-at-law of the deceased, when, as a matter of fact, she was only one of three, the others being John Shane, a brother, and Mary Shane, a sister, and that said John Shane and Mary Shane were not made parties to the proceedings.

Edward P. Kelley and *T. F. McCue,* for appellants.

Upon the death of a person, title to lands owned by him, at once vests in his heirs—in the absence of testamentary disposition of same.

Plaintiffs were not made parties to the proceedings in County Court, and had no notice, and are not bound by same. Blakemore v. Roberts, 12 N. D. 394, 96 N. W. 1029; Gjerstadengen v. Van Dusen, 7 N. D. 612, 66 Am. St. Rep. 679, 76 N. W. 233.

Proceedings had in County Court are void. Smith v. Westerfield, 88 Cal. 374, 26 Pac. 206; Re Haas, 97 Cal. 232, 31 Pac. 893.

Maddux & Rinker, for respondent.

The plaintiffs were not heirs of the deceased, had no interest in the property in question, and cannot maintain this action. Rev. Codes 1905, § 6774.

If the plaintiffs have been defrauded by the administrator, their

remedy is by proper action against him and his bondsmen. Rev. Codes 1905, § 8166.

Plaintiffs must plead, prove, and rely upon their own title, and not upon the weakness of defendant's title. Hannah v. Chase, 4 N. D. 351, 50 Am. St. Rep. 656, 61 N. W. 18; Conrad v. Adler, 13 N. D. 199, 100 N. W. 722.

The decrees of County Court cannot be attacked by action in the District Court. Recitals in administrator's deed, prima facie. 4 Enc. Ev. 584.

Administrator is presumed to act honestly and within the scope of his authority. McKenney v. Minahan, 119 Wis. 651, 97 N. W. 489.

BRUCE, J. (after stating the facts as above). There is obviously no merit in the contention of defendant and respondent that the demurrer was properly sustained because the action was barred by the statute of limitations. The running of the statute of limitations cannot be raised by demurrer, even though the fact is apparent upon the face of the complaint. Rev. Codes 1905, § 6770.

The complaint, however, is clearly vulnerable to the objection that it is lacking in equity. The law seems to be quite well established that the presumption is strongly in favor of the validity of sales of the nature of that in question. 18 Cyc. 814. It is also well established that the existence and regularity of steps in the proceeding, not to establish jurisdiction, but sometimes necessary to perfect title in the purchaser, is almost uniformly presumed where the record is silent. 18 Cyc. 815; Moore Realty Co. v. Carr, 61 Or. 34, 120 Pac. 742. A judgment, indeed, of a court of general jurisdiction, not void on its face, is presumed to be regular and valid. Seaboard Nat. Bank v. Ackerman, 16 Cal. App. 55, 116 Pac. 91, 12 Enc. Pl. & Pr. 216. This rule applies to county courts as well as to district courts. Carter v. Carter, 237 Mo. 624, 141 S. W. 873; Deweese v. Yost, 161 Mo. App. 10, 143 S. W. 72; Hines v. Givens, 29 Tex. Civ. App. 517, 68 S. W. 295; Johnson v. Beazley, 65 Mo. 250, 27 Am. Rep. 276; George v. Norris, 23 Ark. 121; Re Davison, 100 Mo. App. 263, 73 S. W. 373; Dutton v. Wright, 38 Tex. Civ. App. 372, 85 S. W. 1025; Price v. Springfield Real Estate Asso. 101 Mo. 107, 20 Am. St. Rep. 595, 14 S. W. 57. To subject a judgment to collateral attack, the absence of

the jurisdiction of the court entering the judgment must appear on the face of the judgment; and though the record may be irregular and defective, the judgment, if valid upon its face, is not, as a rule, subject to collateral attack. Bamberger v. Green, 146 Ky. 258, 142 S. W. 384; Moore Realty Co. v. Carr, supra. It is not sufficient, in order to overcome the presumption in favor of the jurisdiction of the county court in such a case, for the person who seeks to avoid its consequences to merely allege that he had no legal notice of the pendency of the action in which it was rendered. Such person must allege what, if anything, was shown by the record in relation to the issue and service of process therein. "It is not material," says the appellate court of Indiana in the case of First Nat. Bank v. Hanna, 12 Ind. App. 240, 243, "how erroneous the decree to sell real estate may have been, if the court had jurisdiction of the subject-matter and the parties it can not be assailed collaterally. That the court had jurisdiction of the subject-matter is not denied. It being a court of general jurisdiction, it will also be presumed that it had jurisdiction of the person of appellant, and this presumption would hold good until it is overcome by some showing to the contrary. The court will be presumed to have done its duty, and this includes the presumption that all parties affected by said judgment and decree were properly before it and were duly served with process. Where it appears on the face of the record that the court had jurisdiction, the judgment cannot be impeached collaterally. . . . If it does not so appear, this fact should be pleaded. It is not sufficient in such cases, in order to overcome the presumption in favor of the jurisdiction of the court, to aver that the parties seeking to escape its consequences had no legal notice of the pendency of the action in which it was rendered; but such party must allege what, if anything, is shown by the record in relation to the issue and service of process therein. . . . The reason for the rule just announced is that the record in such matters is conclusive. Were the judgment itself pleaded, and did it show upon its face that the party seeking to avoid it had been served with legal notice, an averment that no such notice had in fact been served would not be sufficient to overcome the recital of notice in the record; and when the record of the judgment is not set forth in the pleading, as it is not in the exception under consideration, every presumption as to what it contains will be indulged in its favor,

until the contrary is made to appear by direct averment." In the case of Cassady v. Miller, 106 Ind. 69, 5 N. E. 713, it was said: "It is nowhere alleged in appellant's complaint that the record of such judgment does not show that she was a party defendant in the action and judgment; nor do the appellants allege that the record shows that no summons was issued in the action for Melissa Cassady, or that she had not been personally served with summons issued therein, and the summons returned by the sheriff showing such service the requisite period of time before the rendition of such judgment. Upon the question of notice the only allegation of the complaint is that she, Melissa Cassady, was not served with process, and did not know of the rendition of such judgment nor of its existence until in 1881. This allegation is wholly insufficient, we think, to overcome the legal presumptions in favor of the validity of the judgment." Again, in the case of Krug v. Davis, 85 Ind. 309, the court said: "It necessarily follows that, besides or instead of denying the fact of service, the complaint should have alleged that there was not in fact, and the record of the judgment did not show, a return of service of summons upon the judgment defendant." See also Lantz v. Moffett, 102 Ind. 23, 26 N. E. 195; Indianapolis & St. L. R. Co. v. Harmless, 124 Ind. 25, 24 N. E. 369; Shoemaker v. South Bend Spark Arrester Co. 135 Ind. 471, 22 L.R.A. 332, 35 N. E. 280; Hadley v. Bourdeaux, 90 Minn. 177, 95 N. W. 1109; Clark v. Thompson, 47 Ill. 25, 95 Am. Dec. 457; Crawford v. McDonald, 88 Tex. 626, 33 S. W. 325; Gulickson v. Bodkin, 78 Minn. 33, 79 Am. St. Rep. 352, 80 N. W. 783; Stearns v. Wright, 13 S. D. 544, 83 N. W. 587; Exchange Bank v. Ault, 102 Ind. 322, 1 N. E. 562; Crittenden Lumber Co. v. McDougal, 101 Ark. 390, 142 S. W. 836; Potter v. Whitten, 161 Mo. App. 118, 142 S. W. 453: 1 Simon Pro. Pr. § 820; Kingman v. Paulson, 126 Ind. 507, 22 Am. St. Rep. 611, 26 N. E. 393; Westcott v. Brown, 13 Ind. 83; Dutton v. Wright, 38 Tex. Civ. App. 372, 85 S. W. 1025; Carter v. Carter, 237 Mo. 624, 141 S. W. 873; Bamberger v. Green, 146 Ky. 258, 142 S. W. 384.

That the proceeding at bar is a collateral attack upon the judgment of the county court is beyond question. "A collateral attack on a judgment," says the supreme court of Texas, in the case of Crawford v. McDonald, 88 Tex. 626, 33 S. W. 325, 327, "is an attempt to avoid its binding force in a proceeding not instituted for one of the purposes

aforesaid, as where, in an action of debt on a judgment, defendant attempts to deny the fact of indebtedness, or where, in a suit to try the title to property, a judgment is offered as a link in the chain of title and the adverse party attempts to avoid its effect." The court in this case held that an attack in trespass to try title of the devisees against a purchaser at an executor's sale upon a judgment by a probate court having jurisdiction over plaintiff, who confirmed the sale, was a collateral attack. See also subject "Collateral Attack," 2 Words & Phrases, 1249. "Wherever the validity of an executed order of sale is drawn in question other than by appeal, writ of error, certiorari, or timely application to the court wherein the order was made, the attack is collateral. Thus actions of ejectment, or in the nature of ejectment, wherein the title of a party claiming under a sale is attacked, bills to enjoin such actions, bills in equity to annul sales on any other ground than fraud, actions for the recovery of the purchase money where the defendant denies the validity of the sale, and objections at the final settlement of the executor or administrator, are collateral attacks." Enc. Pl. & Pr. 927, 928, and cases cited.

There can also be no question that the proceedings leading up to the sale of the real estate by the administrator are proceedings *in rem*. Satcher v. Satcher, 41 Ala. 26, 91 Am. Dec. 498; Goodwin v. Sims, 86 Ala. 102, 11 Am. St. Rep. 21, 5 So. 587; Johnson v. Beazley, 65 Mo. 250, 27 Am. Rep. 276.

It may be true in the case at bar, under the provisions of §§ 8024 and 8135, Rev. Codes 1905, that it was the duty of the court, if there were other heirs, or if it had reason to believe that there were other heirs, to give them notice of the proceedings and to cite them in. The petition, however, stated that the petitioner was the sole and only heir-at-law, and the presumption, in a case of collateral attack at any rate, is that the court passed upon this question. See Ewing v. Mallison, 65 Kan. 484, 93 Am. St. Rep. 299, 70 Pac. 369. "The general rule," says the supreme court of Texas in the case of Crawford v. McDonald, 88 Tex. 631, 33 S. W. 325, "is well established that a judgment rendered by a court even of general jurisdiction is void if it had, at the time of the rendition of the judgment, no jurisdiction of the person of the defendant or the subject-matter of the litigation. This principle is self-evident, because, until the court acquires jurisdiction,

it has no power to proceed to investigate and determine private rights. Logically, it can make no difference as to the validity of a judgment, whether the lack of jurisdiction of the person or of the subject-matter appears from the face of the record, or is made to appear by evidence *aliunde;* for if, for instance, no service was had upon the defendant, he not appearing in the case, the court, having no jurisdiction whatever over his person, is absolutely without power to bind him by an adjudication that he had been in fact duly served; and logically this want of power is the same whether the lack of jurisdiction appears on the face of the record or not. There is, however, another rule of law equally well settled upon principles of public policy, which precludes inquiry by evidence *aliunde* the record, in a collateral attack upon a judgment of a domestic court of general jurisdiction regular on its face, into any fact which the court rendering such judgment must have passed upon in proceeding to its rendition. Therefore it is well settled that where a personal judgment has been rendered against a defendant by a domestic court of general jurisdiction, and, under the same, his property has been seized and sold, he will not, in a contest over the title to the property, be allowed to show by evidence *dehors* the record, that the judgment was rendered without any service whatever upon him. Logically the judgment is in fact void, but on grounds of public policy the courts, in order to protect property rights, apply the rule aforesaid, which precludes inquiry into facts *dehors* the record for the purpose of showing the invalidity of the judgment, and therefore for all practical purposes in such collateral attack the judgment is held valid. . . . A court, in confirming the sale, will be conclusively presumed in this collateral attack to have investigated and determined correctly that the sale was made at the proper place, and no evidence *aliunde* to the contrary will be permitted to impeach the correctness of the judgment. The only relief, if any, permitted by the rules of law against an improper determination of such question by the court in rendering such judgment of confirmation is to be found in a direct attack upon the judgment where the court has full power to adjust the equities of the parties litigant." Richardson v. Butler, 82 Cal. 174, 16 Am. St. Rep. 101, 23 Pac. 9; 12 Enc. Pl. & Pr. 196; Price v. Springfield Real Estate Asso. 101 Mo. 107, 20 Am. St. Rep. 595, 14 S. W. 57; Re Davison, 100 Mo. App. 263, 73 S. W. 373; Seaboard Nat.

Bank v. Ackerman, 16 Cal. App. 55, 116 Pac. 91; Empire Ranch & Cattle Co. v. Coldren, 51 Colo. 115, 117 Pac. 1005; Bamberger v. Green, 146 Ky. 258, 142 S. W. 384; Crittenden Lumber Co. v. McDougal, 101 Ark. 390, 142 S. W. 836. There can be no question that the court had jurisdiction in this case. Jurisdiction was conferred by the petition. Richardson v. Butler, 82 Cal. 174, 16 Am. St. Rep. 101, 23 Pac. 9; Morris v. Robbins, 83 Kan. 335, 111 Pac. 470, 472; Satcher v. Satcher, 41 Ala. 26, 91 Am. Dec. 498. The petition was filed by an heir-at-law who stated that she was the only heir-at-law. Upon its face it was regular, and the proceedings of the court were regular. It may be that there were other heirs. The record, however, did not disclose the fact, or, at any rate, the pleading does not show that the record disclosed the fact. In the absence of such allegation the regularity of the proceedings must be presumed, and that the court determined that there were no other such heirs, and that no other notice need to be given.

But it may be contended that the rules above stated do not apply with their full force where fraud is present, and that, where a sale is brought about by fraud, a judgment or other proceeding may be collaterally attacked in a court of equity. Such is undoubtedly the rule. 18 Cyc. 810. It is, however, equally the rule that a bill to set aside a sale for fraud must charge the purchaser with notice of the fraud, and that there should be an offer in the pleadings to restore the purchase money. See 18 Cyc. 814; Gormley v. Palmes, 13 La. Ann. 213. There is no such allegation of fraud or complicity in fraud on the part of the defendant, Peoples, to be found in the complaint in this case. All that is said is "that on or about the 26th day of December, 1899, Margaret Shane Dunton filed her petition in the county court of Eddy county, North Dakota, praying for administration to be had upon the estate of William Shane, deceased. Through fraud and connivance, representing to the said county court that she, the said Margaret Shane Dunton, was the sister and only heir-at-law of the deceased; that in pursuance of the said petition for letters of administration, certain pretended proceedings were had in said Eddy county, attempting to probate the estate of the said deceased. . . . That carrying out the design to defraud these plaintiffs out of their rights, the said Peter J. Butler, as administrator, caused said real estate to be sold at admin-

istrator's sale, to the defendant herein, without any notice of any kind whatever, or any citation or any proceedings making the plaintiffs parties; that no notice was given in any manner whatever; that the said Margaret Shane Dunton consented to such conveyance." As far, indeed, as the defendant is concerned—and he is the party interested in this suit—the complaint is absolutely lacking in equity.

The judgment of the District Court is affirmed.

BURKE, J., being disqualified, did not participate.

FIRST INTERNATIONAL BANK OF PORTAL, a Corporation, v. JOHN J. LEE.

(141 N. W. 716.)

Discharge in bankruptcy — effect of — personal to bankrupt.

1. The effect of a discharge in bankruptcy is personal to the bankrupt.

Federal bankruptcy act — liens — property — exemptions — jurisdiction — attachment — lien of.

2. The Federal bankruptcy act of 1898, 30 Stat. at L. 565, chap. 541, U. S. Comp. Stat. 1901, p. 3450, only avoids liens upon property which passes to the trustee in bankruptcy, and over which the bankruptcy court could and has assumed jurisdiction. By setting aside property as exempt, such court is *held* to have disclaimed any intention of ever assuming or having ever assumed jurisdiction over it, and it cannot be said to have passed, at any time, to the trustee in bankruptcy. Where, therefore, property is seized upon a writ of attachment, and thereafter bankruptcy proceedings are instituted and said property is scheduled, but in said proceedings is set apart as and for the exemptions of the debtor, the lien of the attachment writ will not be considered to have been avoided.

Principal debtor — exemptions — exercise of right — who may have.

3. The exemptions given by § 7115 to § 7129, inclusive, of the Codes of 1905, are primarily for the benefit of the family as a whole, and not of the husband, or even the wife. Though, therefore, § 7124 in terms prescribes that the principal debtor, his attorney, agent, wife, or child must make demand for the benefit of the exemptions allowed, within three days after notice from the officer of the levy, such statute is construed as applying merely to the principal debtor, and to the other persons when served as agents of such principal debtor; while § 7122, which gives to the wife, or, in case of the refusal of the

wife, to the children, the right to claim the said exemptions in case the principal debtor neglects or refuses so to do, and which contains no limitation as to time, will be construed to permit the exercise of that right within a reasonable time, which is not limited by the three days allowed to the principal debtor.

Opinion filed April 23, 1913.

Appeal from the District Court for Ward County, *Leighton,* J.

Action against a sheriff to recover damages for his failure to levy upon certain property under a writ of attachment. The defendant alleged that said property was exempt under the statute. Verdict and judgment for plaintiff. From an order granting defendant's motion for a new trial, plaintiff appeals.

Affirmed and remanded.

This is an appeal from an order of the district court of Ward county, granting the defendant's motion for a new trial. The action was one which was brought against the defendant, John J. Lee, as sheriff of Ward county, to recover damages resulting from his failure to levy upon and sell certain personal property which had been attached by the plaintiff bank in an action against one John Schuler. The case was before this court on appeal in First International Bank v. Lee, 19 N. D. 10, 120 N. W. 1093, Ann. Cas. 1912 D, 731, and now comes before us for the second time.

The main grounds of the defendant's motion for a new trial are accident and surprise and newly discovered evidence. The surprise is said to consist in the fact that, on the second trial, the testimony showed "that John Schuler went into bankruptcy after the attachment and before judgment was rendered, and at the time the action was commenced defendant had no knowledge of any bankruptcy proceedings on the part of the said John Schuler, and that he heard of such bankruptcy proceeding for the first time during the trial of the action, and H. S. Blood, the attorney who appeared for the defendant was called on unexpectedly to try the case for the defendant, and, at the time the action was called for trial, he did not know that the said John Schuler had ever instituted a proceeding in bankruptcy, and that during the trial he learned for the first time that bankruptcy proceedings

of some kind had been had, and that he had no means at hand of determining their nature, and that the record of the said proceedings was with the clerk of the United States district court at Fargo; and that LeSueur & Bradford, composed of Arthur LeSueur and B. H. Bradford, were retained by the defendant in this action, and that Mr. B. H. Bradford retired from the practice of law on or about the 10th day of January, 1911, and that the firm of Noble, Blood, & Adamson succeeded to the law practice of Arthur LeSueur, successor to the firm of LeSueur & Bradford; that the proceedings in said bankruptcy court, as shown in the statement, showed that the property involved in the action was claimed as exempt by the said John Schuler in the bankruptcy court, and the same was set over to the said John Schuler as his exempt property in said bankruptcy proceedings, and said proceedings in said bankruptcy court were a complete bar to the recovery of any judgment in the case against John Schuler, and are a complete bar to the recovery of the plaintiff in this action." The discovery of the new evidence is alleged as follows: "Newly discovered evidence material to the defendant, which he could not with reasonable diligence have discovered and produced at the trial, and the defendant would specify as newly discovered evidence the fact that, since he has learned that after the property involved in this action had been attached in an action by this plaintiff against one John Schuler, that the said John Schuler filed a petition in bankruptcy on the 17th day of January, 1905, and that he made a claim for exemptions in said bankruptcy proceedings of the identical property for the value of which the said action has been instituted, and that in the schedule of property and petition of the said John Schuler is listed the claim of the plaintiff for which claim the plaintiff subsequently secured judgment against the said John Schuler, and that the plaintiff listed and filed in said bankruptcy court the claim for which said judgment was procured against the said John Schuler, and on the 17th day of February, 1905, appeared in said bankruptcy court and proved said claim before Guy L. Wallace, referee in bankruptcy; and that on the 10th day of May, 1905, the property involved in this action was set over in said bankruptcy court to said John Schuler as and for his exemption; that the defendant has learned since the trial that the property involved in this action was set over to the said John Schuler as exempt while the at-

tachment action between the plaintiff herein and the said John Schuler was pending in the district court of Ward county wherein judgment was rendered against John Schuler, and that his petition in bankruptcy was filed in the bankruptcy court and that the claim of the plaintiff involved in said action was listed and filed, and the plaintiff appeared in said bankruptcy court and proved said claim, and the property was claimed as exempt and was set over to the said John Schuler as exempt, and the said John Schuler was adjudged a bankrupt while this action was pending, and the said newly discovered evidence shows that the said bankruptcy proceedings was a complete bar to the maintenance of the action in attachment and the rendition of the judgment against the said John Schuler, and that the same is a complete bar to the recovery of any judgment against this defendant for any alleged wrongful release of the said property."

Palda, Aaker, & Greene, for appellant.

Property held under attachment, and thereafter set apart as exempt, in bankruptcy proceedings, at once comes under the lien of the attachment. Where defendant, sheriff, fails to preserve such lien, action will lie. Jewett Bros. v. Huffman, 14 N. D. 110, 103 N. W. 408; Burcell v. Goldstein, 23 N. D. 257, 136 N. W. 243; Powers Dry Goods Co. v. Nelson, 10 N. D. 580, 58 L.R.A. 770, 88 N. W. 703.

In action against sheriff for damages, the defense of the pendency of bankruptcy proceedings by execution debtor, not available. Such pleas are personal to the bankrupt. Collier, Bankr. 5th ed. p. 138; Johnson v. Bishop, 8 Nat. Bankr. Reg. 533, Fed. Cas. No. 7,373; 5 Cyc. 405, notes 75, 76.

Due diligence must be shown, in motion for new trial on ground of newly discovered evidence. McBride v. McClintock, 108 Iowa, 326, 79 N. W. 83.

Noble, Blood, & Adamson, for respondent.

Courts are reluctant to disturb orders granting new trials. Rickford v. Martin, 43 Mo. App. 597.

Notice must be given of levy upon property. Rev. Code 1905, § 7124.

Plaintiff waived the lien of its attachment, by proving and filing its claim, in the bankruptcy proceedings, as an unsecured claim. Re

Downing, 15 Am. Bankr. Rep. 423; Dunn Salmon Co. v. Pillmore, 19 Am. Bankr. Reg. 172, 55 Misc. 546, 106 N. Y. Supp. 88; Northern Shoe Co. v. Cecka, 22 N. D. 631, 135 N. W. 177.

BRUCE, J. (after stating the facts as above). The defense of bankruptcy proceedings or of a discharge in bankruptcy is personal to the bankrupt. 5 Cyc. 405; Palmer v. Merrill, 57 Me. 26; Moyer v. Dewey, 103 U. S. 301, 26 L. ed. 394; Re Burton, 29 Fed. 637. There is nothing in the record that tends to show that the principal debtor ever sought to avoid the attachment proceedings in this case by pleading the proceedings in bankruptcy. It is true he alleges that the principal defendant filed a petition in bankruptcy on the 17th day of January, 1905, and in such proceedings claimed as exempt the identical property for the value of which said action has been instituted, and that in the schedule of property and petition of the said Schuler is listed the claim of the plaintiff, for which claim the plaintiff subsequently secured judgment against the said John Schuler, and that the plaintiff listed and filed in said bankruptcy court the claim for which the said judgment was procured against said John Schuler, and on the 17th day of February, 1905, appeared in said bankruptcy court and proved said claim before Guy L. Wallace, referee in bankruptcy, and that on the 10th day of May, 1905, the property involved in this action was set over by said bankruptcy court to the said John Schuler as and for his exemptions. In the case of Burcell v. Goldstein, 23 N. D. 257, 136 N. W. 243, however, we held that § 67–f of the Federal bankruptcy act of 1898 (act of July 1, 1898, chap. 541, 30 Stat. at L. 565, U. S. Comp. Stat. 1901, p. 3450) only avoids liens upon property which passes to the trustee in bankruptcy, and over which the bankruptcy court could and has assumed jurisdiction. We further held that, by setting aside the property as exempt, such court will be held to have disclaimed any intention of assuming or of having ever assumed jurisdiction over it, and that it cannot be said to have passed at any time to the trustee in bankruptcy; nor would the fact that on account of such adjudication in bankruptcy a personal judgment cannot be rendered against the defendant in a district court, alter the case or preclude the foreclosure of the lien, as the jurisdiction of the district court is *in rem,* and not *in personam.* Under that case and the numerous

authorities cited therein, the discovery of the bankruptcy proceedings was a discovery of evidence which was absolutely immaterial, and, even though due diligence in its procurement was shown—which is not the fact, as the petition merely alleges a conclusion of law—no new trial could have been properly based thereon.

This leads us to a consideration of the question as to whether the trial court erred in excluding from the evidence Exhibit A, which is a claim of exemptions served by the wife of the principal defendant, one Katie Schuler, on the 29th day of July, 1905, and something over seven months after the notice of the levy of attachment. The defendant argues that this evidence was competent and material in spite of the fact that § 7124, Rev. Codes 1905, requires such claims to be served within three days after notice of the levy. He states that Katie Schuler had supposed that her husband, John Schuler, had made claims for his exemptions,—in fact, that she had been so informed by him, and that she did not learn the contrary until the 27th day of July, 1905. He argues that by the statute (§ 7122) the wife is not limited to the three-day period, and may, in case her husband fails to assert the right, serve her claim on behalf of herself and her family within a reasonable time thereafter. He claims that under the peculiar circumstances disclosed by the affidavits, she acted within such reasonable time. He also maintains that in so far as the claim of exemption filed by the original defendant, John Schuler, is concerned, that the statute merely requires that the same shall be served within three days after notice from the officer which is required to be given by § 7124, and that there is no evidence on the trial that that notice had ever been given.

As far as the claim of the wife is concerned, counsel for respondent cites § 7122 of the Code, which provides that "if in any case the debtor neglects or refuses, or for any cause fails, to claim the whole or any of the aforesaid exemptions, his wife is entitled to make such claim or demand, and to select and choose the property, to select and designate one of the appraisers, and to do all other acts necessary in the premises the same and with like effect as the debtor himself might do; and if she neglects, refuses, or for any cause fails, so to do, in whole or in part, then one of their children of sixteen years of age or upwards, being a member of the family, may do so in like manner and with like effect." He calls attention to the case of Noyes v. Belding,

5 S. D. 603, 59 N. W. 1069, in which the court, in holding that a claim by the wife of a homestead exemption made thirty-two days after the expiration of the time allowed to her husband was not too late, said: "The statute requiring the officer to give to the debtor, his attorney, agent, or wife a notice of levy, provides that the debtor, or such other person for him, must claim or demand his exemptions within three days after such notice, and if in any case the debtor neglect or refuse, or for any cause fail, to claim the whole or any part of said exemptions, his wife is entitled to make such claim or demand. As the debtor is allowed three days in which to make the claim, it cannot be said that he is in default until the expiration of that time, and no force or effect can be given to the statute authorizing a wife to make the demand in case of a failure in that regard on the part of the husband, unless she can make the claim subsequent to the expiration of the three days allowed to her husband, as she would not be entitled to exercise the right within the three days, provided the notice of levy had been served upon her husband, and it is conceded to have been so served in the case before us, and not upon the wives. A statute requiring the wife to make the claim or demand forthwith thereafter would doubtless be construed to mean within a reasonable time after the failure of the husband to demand his exemptions, and should it appear that the wives of Knowles and Marshman exercised their respective rights within a reasonable time after the failure of their husbands so to do, we would be reluctant, in the absence of any statutory limitation as to them, to reverse this case upon that ground, should it appear that no one has been prejudiced by the delay. . . . The undisputed evidence shows that the notice of levy was served upon Knowles and Marshman on the 27th day of September, consequently the time within which they could claim property as exempt expired on the 30th of that month. The claim of the wives was dated November 2d following, and the appraisement thereunder seems to have been made sometime during the succeeding February or March. It will be noticed that during the month the exemption claim of Mrs. Knowles and Mrs. Marshman was prepared by their attorneys, William G. Knowles commenced a suit involving the ownership of the attached property against the sheriff, and this suit was determined in favor of the sheriff some time during the month of January, the following year, and the

attachment debtors, Knowles and Marshman immediately thereafter put in claims for exemptions, concerning which there seems to have been some contention, in which all the interested parties appeared to have participated. Upon all the facts and circumstances disclosed by the record, and in view of the fact that no steps had been taken towards the sale of the attached property, and in the absence of any claim that plaintiffs were prejudiced by the delay, we are disposed to hold that the claim acted upon by the appraisers was made within a reasonable time." This case is clearly in point. The defendant in the case at bar offers to prove that, though the claim of the wife, Katie Schuler, for exemptions was not served until the 29th day of July, 1905, she had supposed that her husband, John Schuler, had filed a claim for exemptions,—in fact, had been informed by him that he had done so, and did not learn of the contrary until the 27th day of July, 1905. It is to be noticed that although § 7124, Rev. Codes 1905, provides that if the claim is made by the husband it shall be made within three days after notice, § 7122, which allows the wife to assert such claim on the failure of her husband, places no limitation whatever upon the time within which it can be made. It would seem that under the holding of the South Dakota court, as far as the wife is concerned the claim of exemptions was in time, and we are convinced by the logic and reasoning of that case. We hold, in short, that the claim of the wife will not be considered too late provided it is served within a reasonable time after discovering that the husband has not filed such claim, and if the delay has not interfered with vested and material rights. We also hold that under the facts of this case the claim of the wife was filed within such reasonable time. Chesney v. Francisco, 12 Neb. 626, 12 N. W. 94; Robinson v. Hughes, 117 Ind. 293, 3 L.R.A. 383, 10 Am. St. Rep. 45, 20 N. E. 220; Rice v. Nolan, 33 Kan. 28, 5 Pac. 437; Daniels v. Hamilton, 52 Ala. 105; Thompson, Homestead & Exemption, 809; State ex rel. Fulkerson v. Emmerson, 74 Mo. 607.

But it is argued "that the exemptions were not the wife's exemptions, but were the husband's exemptions which she was permitted to make for him in case he failed to make the claim; that since the affidavit of Katie Schuler, which appears in this record, states that her husband had informed her that he had claimed said property as exempt, it is manifest that the husband was in a position where he could have done

so had he desired to do it, and that since no excuse such as the law would require is made or shown, justifying a delay of seven months in the filing of the claim of exemptions, such delay was an indication to the plaintiff in the attachment suit, and should have been an indication to the sheriff, that the defendant in that attachment had waived his right to claim the property as exempt. We do not, however, think there is any force in this contention. The law does not look upon the right to exemptions as a personal right of the husband, or even as being given to the husband at all. It is a family right, rather than a personal right. There is no right of exemptions allowed to a bachelor who is not the head of a family. "Husbands there have been, and may again be," says Mr. Freeman in his work on Executions, § 212, "who are inattentive to their wives and children or wilfully inflict upon them misery and want. The family of such a man, more than of any other, is within the spirit and the necessities of exemption laws, and it is a strange and perverse interpretation of these laws which denies their benefit, even temporarily, to a family whose head is for the moment absent from them, or who, though not absent, is indifferent to their fate." The family idea, in short, is everywhere to be found in the authorities. In Ohio, for instance, the statute declared that "it shall be lawful for any resident of Ohio, being the head of a family, and not the owner of a homestead, to hold exempt from levy and sale personal property to be selected by such person, his agent, or attorney, at any time before sale, not exceeding $500 in value, in addition to the amount of chattel property now by law exempted." An action was brought by a wife, her husband joining, to recover damages sustained by the refusal of a constable to set off property as exempt from execution on her demand. Why the demand was not made by the husband and the action prosecuted solely in his name did not appear. The court, however, construed the statute as made to protect the family, and therefore saw no reason why the wife might not make the demand for the benefit of herself and children, as she was their natural guardian. See Regan v. Zeeb, 28 Ohio St. 487; Freeman, Executions, § 212; Chesney v. Francisco, 12 Neb. 626, 12 N. W. 94; Robinson v. Hughes, 117 Ind. 293, 3 L.R.A. 383, 10 Am. St. Rep. 45, 20 N. E. 220; Freehling v. Bresnahan, 61 Mich. 540, 1 Am. St. Rep. 617, 28 N. W. 531; Frazier v. Syas, 10 Neb. 115, 35 Am. Rep. 466, 4 N. W. 934; Taylor v. Worrel,

4 Legal Gaz. 401; Mitchler v. Helfrinh, 30 Phila. Leg. Int. 216; Waugh v. Burket, 3 Grant Cas. 319; Wilson v. McElroy, 32 Pa. 82; McCarthy's Appeal, 68 Pa. 217; Metzler's Appeal, 73 Pa. 368; Freeman, Executions, § 212.

The order granting the new trial is affirmed.

Goss, J., being disqualified, did not participate.

THE STATE OF NORTH DAKOTA EX REL. ANDREW MILLER, Attorney General of State of North Dakota v. CHARLES H. ALBERTSON et al.

(141 N. W. 478.)

Judgment of dismissal — supplemental complaint — motion for leave to file —moot question — appeal.

After entry of judgment dismissing an action, the question of the action of the trial court in denying a motion for leave to file and serve a supplemental complaint, made prior to entry of judgment, becomes a moot question, and this court will not determine an appeal from such order.

Opinion filed April 25, 1913.

Appeal from an order of the District Court for Burleigh County, *Winchester*, J.

Dismissed.

Andrew Miller, Attorney General, *C. L. Young*, *W. P. Costello*, *F. C. Heffron*, Assistant Attorneys General, for appellant.

Newton & Dullam, for respondent.

SPALDING, Ch. J. This action was brought by the state on the relation of the attorney general to abate a liquor nuisance alleged to be maintained in the city of Bismarck. It was commenced on the 20th of April, 1910, by service of summons, complaint, and injunction, upon the defendants, all of whom defaulted. In October of that year proof was made, but before the judgment was entered, defendant Griffin, the owner of the premises affected, secured an order setting aside the default as to him, and permitting him to answer. This order was en-

tered November 16, 1910. The case went upon the December, 1911, calendar of the court, but by reason of the absence of defendant Griffin, it was taken from that calendar to be tried on notice of ten days by either party.

In August, 1912, the state applied for leave to file a supplemental and amended complaint, for the purpose of alleging the continuance of the nuisance down to that date. September 11, 1912, the court entered an order denying plaintiff's application. On the same day an appeal was duly taken by the state from such order. Judgment was also entered, dismissing the action.

In view of the judgment it is apparent that neither an affirmance nor reversal of the order appealed from could have any effect upon the judgment,—that without a reversal of the judgment the reversal of the order would avail the state nothing. The judgment would still remain in full force, and hence any decision of this appeal would be merely the determination of a moot question. That courts will not pass upon questions which are purely moot is elementary; and we need not discuss the matter, as a mere statement of the facts and principle is sufficient.

The appeal is dismissed, but without prejudice to a review of the order appealed from on appeal from the judgment, should such appeal be perfected.

KERLIN v. CITY OF DEVILS LAKE, Peter J. McClory, as Mayor of the City of Devils Lake; and S. C. Jones, as City Auditor of the City of Devils Lake.

(141 N. W. 756.)

A special city election was held to determine the question of whether such city would increase its debt limit and issue bonds to establish a city light plant. The election was held at one central voting place, instead of having a

Note.—The authorities on the question of registration as condition of right to vote are reviewed in notes in 25 L.R.A. 480, and 90 Am. St. Rep. 57. See also note in 23 Am. Dec. 642.

And on the question of the submission to the voters of a municipal corporation

place for voting in each ward as an election precinct as required by statute. The place of election was where city special elections for years had usually been held. A large vote was polled for a special election. Ample opportunity was afforded all electors to vote. No fraud is alleged in the calling of or in the conduct of the election. *Held:*—

Special city election — ward — time — place — fraud — irregular.

(1) As by statute an election should have been held in each ward, the election was irregular, but not void.

Constitution — election — qualifications — precinct.

(2) Section 121 of our Constitution, as amended, in defining the qualifications of an elector, does not prescribe a rule for voting, nor compel a qualified elector to necessarily vote at a place within the boundaries of the ward in which he resides, though every ward is by statute a voting precinct.

Election — canvass and return — votes — statute — valid.

(3) Where the election is held as called for, at the place designated by the lawful municipal authority, and is regularly conducted, and a fair and regular canvass and return made of all votes cast, with no fraud charged, in the absence of a statute expressly invalidating the election, it will be upheld.

Registration — city elections.

(4) General statutory registration requirements do not apply to a special city election held for this purpose; the details of registration are to be provided for by municipal ordinance.

Fraud — illegal voting — registration.

(5) Want of registration at this special election did not invalidate such election, in the absence of fraud or of a charge of illegal voting sufficient to change the result.

Election — illegal voting — result — fraud — pleading.

(6) An allegation that certain named persons illegally voted at such elec-

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as a single question of several purposes or objects, the above case seems to be in harmony with Hamilton v. Detroit, 83 Minn. 119, 85 N. W. 933, where a proposition submitted to the voters of a village for the establishing of an electric light plant and the payment therefor by bonds was held not invalid as embodying two distinct propositions. Holding to the same effect are Thompson Houston Electric Co. v. Newton, 42 Fed. 723 (erecting electric plant and issuing bonds in payment thereof); People ex rel. Atty. Gen. v. Caruthers School Dist. 102 Cal. 184, 36 Pac. 396 (buying of lot and building of schoolhouse, connected with issuance of bonds or voting of tax); Seymour v. Tacoma, 6 Wash. 138, 32 Pac. 1077 (adoption of a system of waterworks and lighting and incurring of indebtedness therefor). The authorities on the question what objects or purposes may be combined in a single question submitted to the voters of a municipality are gathered in a note in 26 L.R.A.(N.S.) 665.

tion, without charging that it changed the election result, and where insufficient to impute fraud in the conduct of the election, does not charge facts sufficient to invalidate the election.

Election —official notice.

(7) The official notice of election by publication was legally given.

Resolution — ordinance — special election.

(8) A special election for such purposes may be authorized either by resolution or ordinance.

Ballots — preparation of — indefinite.

(9) The ballot, in stating the amount of the proposed bond issue, is too indefinite where the amount is stated as "not to exceed $33,000."

Dual questions — ballots — voting.

(10) A dual question of (1) increase in debt limit, and (2) bonding after increase of debt limit, both for a stated purpose, may be submitted upon the ballot at one election if the form of the ballot permits such propositions to be voted upon separately.

Form of ballots — prejudice — misleading — voters.

(11) The fact that both of the questions to be voted upon were, under the form of the ballot, submitted jointly instead of separately did not prejudice or mislead the voter as to the question of increasing the debt limit.

Election — bonds — debt limit.

(12) Although such election was abortive in so far as it authorized the issuance of bonds, it was valid in so far as it authorized an increase of the debt limit for such purposes.

Opinion filed April 26, 1913.

An appeal from the District Court for Ramsey County, *Winchester,* Special J., from an order vacating an injunctional order.

Modified.

Flynn & Traynor, for appellant.

The amount of the bonds sought to be voted must be stated definitely in the resolution, notice, and ballot. Stern v. Fargo, 18 N. D. 289, 26 L.R.A.(N.S.) 665, 122 N. W. 403.

There is no distinction between the statements, "not exceeding" and "not to exceed," referring to the amount of the bond, and neither is

sufficiently definite. Ibid.; State ex rel. Schultze v. Manchester Twp. Committee, 61 N. J. L. 513, 40 Atl. 589; State ex rel. Lexington & St. L. R. Co. v. Saline County Ct. 45 Mo. 242; Dawson v. Dawson Waterworks Co. 106 Ga. 696, 32 S. E. 907; Hillsborough County v. Henderson, 45 Fla. 356, 33 So. 997; Smith v. Dublin, 113 Ga. 833, 39 S. E. 327.

Dual questions, when not naturally related or connected, but relate to two distinct subjects, cannot be submitted to the voters in the form of one question, and such ballot is improper. Stern v. Fargo, 18 N. D. 289, 26 L.R.A.(N.S.) 665, 122 N. W. 403; Hughes v. Horsky, 18 N. D. 474, 122 N. W. 799.

A majority vote means a majority of all the legal voters of a city, whether voting or not. State ex rel. Little v. Langlie, 5 N. D. 594, 32 L.R.A. 723, 67 N. W. 958; State ex rel. McCue v. Blaisdell, 18 N. D. 31, 119 N. W. 366; State ex rel. Davis v. Fabrick, 18 N. D. 402, 121 N. W. 65, *distinguished.*

There is a distinction between such cases and a case where the proposition is to create a debt against the municipality. Williamson v. Aldrich, 21 S. D. 13, 108 N. W. 1063; State ex rel. Clark v. Stakke, 22 S. D. 228, 117 N. W. 129.

The increasing of indebtedness of a city, or the issuing of bonds, must be covered by *ordinance* duly passed and published. N. D. Rev. Codes 1905, §§ 2675, 2676, 2678; Engstad v. Dinnie, 8 N. D. 1, 76 N. W. 292; Roberts v. Fargo, 10 N. D. 230, 86 N. W. 726.

The ballots did not state the questions to be voted upon, *fully* and *fairly,* and the election was, therefore, invalid. N. D. Rev. Codes 1905, §§ 616, 618.

There are four wards in the city of Devils Lake, each a voting precinct, and this election was held in the first ward—none other of the polling places being open. There is no authority for holding any election in such manner. Rev. Codes 1905, §§ 2678, 2980, 8597; Rev. Codes 1905, § 2743, as amended by Sess. Laws 1911, chap. 65; Rev. Codes 1905, § 2744, as amended by Sess. Laws 1911, chap. 66.

It is a general rule that an election held at an improper place is absolutely void, without proof of fraud or injury. 10 Am. & Eng. Enc. Law, 684–691; Perry v. Hackney, 11 N. D. 148, 90 N. W. 483; State ex rel. Byrne v. Wilcox, 11 N. D. 329, 91 N. W. 955; Whit-

comb v. Chase, 83 Neb. 360, 119 N. W. 673, 17 Ann. Cas. 1090; 15 Cyc. 310; Bean v. Barton County Ct. 33 Mo. App. 635; Territory ex rel. Higgins v. Steele, 4 Dak. 78, 23 N. W. 91; State ex rel. McCarthy v. Fitzgerald, 37 Minn. 26, 32 N. W. 788; Elvick v. Groves, 17 N. D. 561, 118 N. W. 228.

Section 688 of the revised codes does not apply to elections such as the one in this case. Injunction is the proper remedy in cases like the one at bar. Rev. Codes 1905, §§ 605, 698; State ex rel. Little v. Langlie, 5 N. D. 594, 32 L.R.A. 723, 67 N. W. 958; State ex rel. Butler v. Callahan, 4 N. D. 481, 61 N. W. 1025; 15 Cyc. 394; Calaveras County v. Brockway, 30 Cal. 325; Rev. Codes 1905, § 738, as amended by Sess. Laws 1911, chap. 128; Fitzmaurice v. Willis, 20 N. D. 372, 127 N. W. 95; Farren v. Buffalo County, 5 Dak. 36, 37 N. W. 756; Const. No. 121, as amended by art. 2, of Amendments; State ex rel. McCue v. Blaisdell, 18 N. D. 31, 119 N. W. 360; Code 1905, § 2979, as amended by Sess. Laws 1911, chap. 76; Donovan v. Allert, 11 N. D. 289, 58 L.R.A. 775, 95 Am. St. Rep. 720, 91 N. W. 441.

F. T. Cuthbert, City Attorney for respondents (*A. R. Smythe,* of counsel).

The resolution, notice, and ballot are sufficiently definite and certain as to *purpose* and *amount* of the bonds to be issued. Stern v. Fargo, 18 N. D. 289, 26 L.R.A.(N.S.) 665, 122 N. W. 403.

A majority vote of those voting is all that is necessary to carry a proposition like that involved in this case. Rev. Codes 1905, § 2678; State ex rel. Little v. Langlie, 5 N. D. 594, 32 L.R.A. 723, 67 N. W. 958; State ex rel. McCue v. Blaisdell, 18 N. D. 31, 119 N. W. 360; Fabro v. Gallup, 15 N. M. 108, 103 Pac. 272; St. Joseph Twp. v. Rogers, 16 Wall. 646, 21 L. ed. 328; Cass County v. Johnston, 95 U. S. 368, 24 L. ed. 417; Carroll County v. Smith, 111 U. S. 556, 28 L. ed. 517, 4 Sup. Ct. Rep. 539; Pacific Improv. Co. v. Clarksdale, 20 C. C. A. 635, 41 U. S. App. 68, 74 Fed. 528; Lamb v. Cain, 129 Ind. 516, 14 L.R.A. 518, 29 N. E. 13; South Bend v. Lewis, 138 Ind. 516, 37 N. E. 986; Taylor v. McFadden, 84 Iowa, 270, 50 N. W. 1070; Montgomery County Fiscal Ct. v. Trimble, 104 Ky. 638, 42 L.R.A. 738, 47 S. W. 773; Shearer v. Bay County, 128 Mich. 556,

87 N. W. 789; Tinkel v. Griffin, 26 Mont. 432, 68 Pac. 859; Davis v. Brown, 46 W. Va. 719, 34 S. E. 839.

The ballots used in this election stated *fully* and *fairly* the question to be voted upon. Leavenworth v. Wilson, 69 Kan. 74, 76 Pac. 400, 2 Ann. Cas. 367, distinguished.

The official newspaper of a city may be designated by resolution of the city council. Rev. Codes 1905, §§ 2677, 2678, 2980; Ordinance No. 59, City of Devils Lake.

The mere fact that there was but one voting place, at this election, amounted at most to an irregularity, and did not render the election void. State ex rel. Brown v. Westport, 116 Mo. 582, 22 S. W. 888; Lebanon Light & Magnetic Water Co. v. Lebanon, 163 Mo. 246, 63 S. W. 809; Davis v. State, 75 Tex. 424, 12 S. W. 957; Bell v. Faulkner, 84 Tex. 187, 19 S. W. 480; Peard v. State, 34 Neb. 372, 51 N. W. 828; Bowers v. Smith, 111 Mo. 45, 16 L.R.A. 754, 33 Am. St. Rep. 491, 20 S. W. 101; Stemper v. Higgins, 38 Minn. 222, 37 N. W. 95; Preston v. Culbertson, 58 Cal. 209; Sprague v. Norway, 31 Cal. 173; Farrington v. Turner, 53 Mich. 27, 51 Am. Rep. 88, 18 N. W. 544; Zeiler v. Chapman, 54 Mo. 502; Statutory Notice, See McPike v. Pen, 51 Mo. 63; State ex rel. Byrne v. Wilcox, 11 N. D. 329, 91 N. W. 955; Perry v. Hackney, 11 N. D. 148, 90 N. W. 483.

An irregularity in an election, which is free from fraud, and which does not affect the result, is harmless, and does not render the election void. Territory ex rel. Sherman v. Mohave County, 2 Ariz. 248, 12 Pac. 730; San Luis Obispo County v. White, 91 Cal. 432, 24 Pac. 864, 27 Pac. 756; Allen v. Glynn, 17 Colo. 338, 15 L.R.A. 743, 31 Am. St. Rep. 304, 29 Pac. 670; Williams v. Shoudy, 12 Wash. 362, 41 Pac. 169; Ackerman v. Haenck, 147 Ill. 514, 35 N. E. 381; Parvin v. Wimberg, 130 Ind. 561, 15 L.R.A. 775, 30 Am. St. Rep. 254, 30 N. E. 790; Sterritt v. McAdams, 99 Ky. 37, 34 S. W. 903; Smith v. Crutcher, 92 Ky. 586, 18 S. W. 521; State ex rel. Waggoner v. Russell, 34 Neb. 116, 15 L.R.A. 740, 33 Am. St. Rep. 625, 51 N. W. 465; People v. Cook, 8 N. Y. 67, 59 Am. Dec. 451; People v. McManus, 34 Barb. 625, 22 How. Pr. 27; People ex rel. Lefever v. Ulster County, 34 N. Y. 273; Hannah v. Shepherd, — Tex. Civ. App. —, 25 S. W. 137; Soper v. Sibley County, 46 Minn. 274, 48 N. W. 1112; Howser v. Pepper, 8 N. D. 484, 79 N. W. 1018; Bowers v. Smith, 111 Mo. 45,

16 L.R.A. 754, 33 Am. St. Rep. 491, 20 S. W. 101; Farrington v. Turner, 53 Mich. 27, 51 Am. Rep. 88, 18 N. W. 544; Peard v. State, 34 Neb. 372, 51 N. W. 828.

Registration is not necessary to a valid municipal election for special purposes. Madison v. Wade, 88 Ga. 699, 16 S. E. 21; Davis v. Dawson, 90 Ga. 817, 17 S. E. 110; Seymour v. Tacoma, 6 Wash. 138, 32 Pac. 1077; Graves v. Seattle, 8 Wash. 248, 35 Pac. 1079; State ex rel. Kellogg v. Shepherd, 42 Kan. 360, 22 Pac. 428; State ex rel. Eble v. Leavitt, 33 Neb. 285, 49 N. W. 1097.

The fact that such election is held at one general, centrally located polling place, even though there are other precincts in the city, does not invalidate the election. State ex rel. Byrne v. Wilcox, 11 N. D. 329, 91 N. W. 955.

Injunctional relief is not proper in this class of cases. Beal v. Ray, 17 Ind. 554; Sanders v. Metcalf, 1 Tenn. Ch. 419.

Goss, J. This is an appeal from an order of the district court of Ramsey county, dissolving an injunctional order and denying a temporary injunction pending suit. It was heard upon the verified complaint and supporting affidavit and exhibits, together with a verified answer and counter affidavits. The proceeding involves the validity of an election, called and held to increase the debt limit and issue bonds in the sum of $33,000 for the purpose of establishing a municipal light plant in the city of Devils Lake. Questions of law alone are presented. The facts are not in conflict. The case naturally divides into two general divisions: (1) Validity or invalidity of the special election; and (2) the election being sustained, what were the results accomplished thereby?

Appellant urges that the election held was void for the reason that the city of Devils Lake at the time of the election, and for some time prior thereto, consisted of four wards, from each of which aldermen were elected, and that each ward constituted an election precinct under the express provisions of § 2743, Rev. Codes 1905, as amended by chapter 65 of the Session Laws of 1911, in force when the election occurred on November 6, 1911. That said city contained a population of over 5,000 people, with approximately 700 legal voters residing therein. That instead of holding an election in each ward, as a several pre-

cinct of said city, the special election for bonding purposes was held at one place at which all the voters of the city desiring to participate were obliged to vote or refrain from voting. The uncontroverted affidavits of the defendants admit that said election, as conducted, was held at the city fire hall, centrally and conveniently located within said city, and that the total vote there cast was 483; that all special elections had for various purposes have always been held at said place since 1885, notwithstanding that the city had been divided into wards in 1887; and that the holding of all special city elections in this building had been customary throughout that time, and that all special and school elections for more than ten years last past have been so held at said place, all the voters in the city casting their ballots at the one central voting place; and that pursuant to that custom this election was so held; that an unusually large vote (483) for a special election was cast; the total vote of the city cast at the last preceding general election was but 595, and the total vote cast at the last previous city election was 609. That said fire hall was sufficiently large, commodious, and convenient to accommodate all the voters, and the facilities provided would have accommodated more than three times as many voters as voted at said election. That the fire hall is practically in the center of said city, and accessible from all parts of the city, and is the usual and customary voting place and precinct of the first ward of the city in general elections, and was a convenient place for the voters of the various other wards of the city to use for such purposes. No fraud in the conduct of said election is alleged, and no prejudice to the right of any voter to exercise his franchise is charged, nor is it claimed that the election had was not a full and fair expression of public opinion on the subject evidenced through the ballot box, 327 votes being cast in favor of increasing the debt limit and the issuance of bonds, to 156 votes cast against the same, the proposition carrying by more than a two-thirds majority.

The question thus confronting us is whether the ignoring of the wards as election precinct lines, and the holding of this election for the whole city at one voting place, voids the election under the above circumstances. If so, this case is determined without considering other matters involved.

There can be no question but what the plain statute, § 2743, Rev.

Codes 1905, in express words provides that each ward of a city "shall constitute an election district" in the case here presented; and, also, "that in city elections separate ballot boxes and poll books shall be provided and kept for each ward." And that "such wards and precincts shall constitute election districts for all state, county, city, and school elections." And we must remember that, aside from the plain intent of the statute as derived from the unambiguous and plain terms of it, the legislature in 1911 amended the prior law, § 2743, Rev. Codes 1905, by adding the above provisions requiring the keeping of separate ballot boxes and poll books for each ward, and also bringing city and school elections under the statute, thereby making the statute operate uniformly upon all elections, state, county, city, and school, and both general and special. There can be no question but what, under the plain statute, it was the duty of the city authorities to provide for and have conducted a polling place at some place within each ward, to comply with the statute quoted. In addition to this, § 121 of our state Constitution, as amended, provided at the time of this election who should vote thereat, by the following constitutional provision: "Every male person of the age of twenty-one years or upwards, . . . who shall have resided in the state one year and in the county six months and in the precinct ninety days, next preceding any election, shall be . . . a qualified elector at such election." The proposition of law thus presented is whether this election is merely irregular, or instead void, when so conducted in disregard of the plain terms of this statute, and any inference bearing thereon to be derived from the above constitutional definition of an elector. At first blush, and from abstract reasoning without a careful investigation of the many adjudications throwing light on the question before us, one would likely conclude that the election was void. But research discloses that the great weight of authority, if not all the authority, is the other way, and that public policy enters into the question. On reasons of public policy, courts have been reluctant to hold elections void except where imperatively necessary from the plain expressed legislative purpose. Thus, where the legislature says, as in registration, that a vote shall not be received from a nonregistered voter, nothing remains to the courts but to give force to the declared legislative intent, and such is our law. See Fitzmaurice v. Willis, 20 N. D. 372, 127 N. W. 95. And where

the court must choose between holding valid or invalidating an entire election, the reason for holding the election valid would be stronger where, as in a case of this kind, an entire city must be disfranchised, than where the ballots of a limited number of persons or even a precinct would be thrown out. If courts hesitate to disfranchise the few, the greater the reason, then, for reluctance in setting aside the expressed will of all by the declaration that a whole election is invalid. Hence we find the rule of law, announced for the application of statutes and the particular constitutional provision before us, in cases similar to this, to be that generally where the statute does not in express terms declare that the election shall be void, or where the constitutional provision does not, by reasonable inference, invalidate the election, the election will be sustained and the violation of statute will be treated as an irregularity, going to the form, instead of to the substance, where, from all the facts, the court does conclude that, in spite of the departure from statutory requirements, a full and fair ballot has been cast and a true and fair return of the entire election has been canvassed and made. Indeed, it has been held that this rule of law is so well established that it should be considered as the common law, controlling in the light of which the statute was enacted, and with which the statute must be interpreted, and affecting its application, unless the statute in express terms negatives it by a declaration that the election held in disregard of the statute shall be void. Bowers v. Smith, 111 Mo. 45, 16 L.R.A. 754, 33 Am. St. Rep. 491, 20 S. W. 101, where, after referring to the English ballot act of 1872 (35, 36 Vict. chap. 33, § 13), providing that "no election shall be declared invalid by reason of a noncompliance with the rules contained in the first schedule to this act, or any mistake in the use of the forms in the second schedule to this act, if it appears to the tribunal having cognizance of the question that the election was conducted in accordance with the principles laid down in the body of this act, and that such noncompliance or mistake did not affect the result of the election," the Missouri court, commenting thereon, says: "It has been judicially determined in that country that the language just quoted is merely declaratory of the common law of England. Woodward v. Sarsons (1875) L. R. 10 C. P. 751. It . . . goes no further as a curative power than the accepted general principles of the law of elections in this country as expounded by the courts."

The opinion also states: "It has been sometimes said in this connection that certain provisions of election laws are mandatory and others directory. These terms may, perhaps, be convenient to distinguish one class of irregularities from the other. But, strictly speaking, all provisions of such laws are mandatory in the sense that they impose the duty of obedience on those who come within their purview. But it does not, therefore, follow that every slight departure therefrom should taint the whole proceedings with fatal blemish. Courts justly consider the chief purposes of such laws, namely, the obtaining of a fair election and an honest return, as paramount in importance to the minor requirements which prescribe the formal steps to reach that end; and in order not to defeat the main design are frequently led to ignore such innocent irregularities of election officers as are free of fraud and have not interfered with a full and fair expression of the voters' choice. Thus in Davis v. State (1889) 75 Tex. 420, 12 S. W. 957, the law required that each ward in a town should 'constitute an election precinct;' yet in San Marcos, a town incorporated with four wards, the county commissioners established two precincts only (without reference to ward lines), and each included parts of the adjacent country; but the court, after full discussion of the general subject, held that the election at those precincts was not avoided by the irregularity. In Stemper v. Higgins (1888) 38 Minn. 222, 37 N. W. 95, a general election was conducted in the village of Madelia, by its officers, as though it constituted a district separate from the township in which it was situated, where also a precinct was open; whereas the law declared that 'every organized township and every ward of an incorporated city is an election district;' yet the court held the returns from the village valid, despite the irregularity indicated. These cases find support in others, illustrating the same principle." In the main case cited, Bowers v. Smith, instead of voting four precincts or wards at one polling place, the city of Sedalia, which legally constituted one voting precinct, arbitrarily for the convenience of the electors divided the precinct by establishing two polling places instead of one, requiring the electors whose surnames began with the letters "A" to "K" to vote at one, while those included within the letters "L" to "Z" voted at the other; and appointed, without authority of law, an entire set of election officers for the polling place so created without legal sanction. Thus, an additional

polling place, with an entire set of election officers to conduct such election, was thus, for convenience, created. The election was sustained. The case of Davis v. State, supra, was also closely parallel in facts and principle to the case before us. The statutes applying were practically identical with our statute under consideration. The Texas statute provided that "each ward shall constitute an election precinct." The opinion states the facts "that San Marcos had been incorporated and was divided into four wards, and that but two election precincts had been established in the city by the commissioners, and that these were established without reference to the wards, and that they included parts of the surrounding country." The matter was exhaustively considered, a dissent being filed by one justice. The opinion also shows the same constitutional provision entered into the discussion there as here. We quote: "The main design of all election laws is, or should be, to secure a fair expression of the popular will in the speediest and most convenient manner; and we think a failure to comply with provisions not essential to attain that object should not avoid the election, in the absence of language clearly showing that such was the legislative intent. But there is no express declaration in the statute that a failure of the commissioners' courts to make each ward an election precinct shall avoid the election. Nor does it contain any words from which it should be necessarily implied that such was the intention. If such is the meaning of the law, it must be arrived at by construction. It may be conceded that one purpose of the provision was to prevent illegal voting. The constitution required that each voter should vote in his precinct. Hence, the provision that each ward of a town or city should constitute a precinct made it necessary that each voter should cast his vote in the vicinity where, as a general rule, his qualifications to vote were best known. So far it tended to secure the purity of the ballot box. That consideration of public policy may in part . . . have led to the enactment of the statute. On the other hand, it may have been inserted for the convenience of the voters living in incorporated towns and cities. However that may be, there was a more important matter which ought to have been considered by the legislature in inserting the article; namely, the result of making a compliance with it an essential prerequisite of the validity of the election. That result would be to create confusion, to produce litigation, and to bring about the neces-

sity for new elections in cases where the popular will has been fairly expressed. We think this was not intended. It is better to take the chances of a few fraudulent votes being cast, which may or may not change the result, than that an election should be set aside because of the failure of the commissioners' court to do their duty in particulars not affecting the general fairness of the ballot. It may be said that the language of the article is not persuasive merely, but imposes upon the court an imperative duty (in designating polling places). Let it be conceded. It does not follow that a failure to perform the duty makes its action void. . . . It may be said that the use of the word 'shall' shows that the provision is mandatory. That it is a command to the commissioners' court may be granted; but it does not follow that it is mandatory in the sense that it make a compliance with the provisions essential to the legality of the election. The word 'shall' has been frequently construed as not mandatory, when the provision in which it was found did not confer a private right, and the public interest did not demand such construction. . . . We think that when the commissioners' courts have fixed the precincts, and the election has been held, it ought not to be set aside because they have failed to make each ward in a city an election precinct, unless it be shown that they have acted with a fraudulent purpose."

And these cases of Bowers v. Smith, 111 Mo. 45, 16 L.R.A. 754, 33 Am. St. Rep. 491, 20 S. W. 101, and Davis v. State, 75 Tex. 420, 12 S. W. 957, have both been followed heretofore by this court in State ex rel. Byrne v. Wilcox, 11 N. D. 329, 91 N. W. 955, at page 961, and Perry v. Hackney, 11 N. D. 148, 90 N. W. 483, following Miller v. Schallern, 8 N. D. 395, 79 N. W. 865. State ex rel. Byrne v. Wilcox, supra, has committed this court upon the question before us. The facts are closely parallel. It involved an election in which the county commissioners had disregarded ward lines to prevent confusion arising from a portion of the city of Bismarck being in one commissioner district and a part in the other; and where wards had been established without regard to the commissioner districts, the territory in certain wards including territory in both commissioner districts. The county commissioners readjusted the precinct boundaries without regard to the wards, and the question arose whether the election that would be conducted thereafter in the precincts as established by the county commissioners

would be void. The basis for declining to assume jurisdiction in State ex rel. Byrne v. Wilcox is given in the opinion to be that the election similar to this one would be irregular only, and not void, and hence the franchises of the state could not be affected. Assuming, without deciding for the purposes of the decision, that a void election would affect them, what is there said cannot then be regarded as *obiter*. We quote from the opinion in 11 N. D. at page 340, 91 N. W. at page 961: "This court will assume, for the purpose of disposing of the motion to quash, that the precincts attempted to be created by the recent action of the county board were created without legal authority, and are illegal precincts, and, consequently, that the election sought to be enjoined in such precincts will, if permitted to be held, be an irregular election. Conceding this, the question is presented whether such irregular election, if held, will be so far vitiated by its illegality that, in the event of a contest, the lawful voters will lose their votes, and the election itself be set aside by a court of competent jurisdiction. It is our opinion that no such inference can be drawn from the facts set forth in the petition. . . . Finally, we hold, for the purposes of the motion under consideration, that the proposed election in the precincts in dispute, if actually held, will not be an invalid and wholly void election, but will be merely an irregular election, and one which, in our opinion, cannot so operate as to have any injurious effect upon any substantial rights of voters or of candidates. It is elementary that mere irregularities in conducting an election, which is fairly conducted, and which do not defeat or tend to defeat an expression of the popular will at the polls, will not so operate as to vitiate an election. To this rule there is an important exception. Where the statute in terms declares or necessarily implies that any particular act or omission shall defeat an election, the same is construed as a mandatory statute, and every such statute is required to be enforceable strictly in accordance with its terms." Citing Perry v. Hackney, 11 N. D. 148, 90 N. W. 483; Davis v. State, 75 Tex. 420, 12 S. W. 957; Peard v. State, 34 Neb. 372, 51 N. W. 828; Bell v. Faulkner, 84 Tex. 187, 19 S. W. 480. And in the opinion in Perry v. Hackney, we find copious extracts from Bowers v. Smith, 111 Mo. 45, 16 L.R.A. 754, 33 Am. St. Rep. 491, 20 S. W. 101. The Missouri and Texas cases, therefore, have already been approved by our own court in a case with facts very similar to this. And

Texas has followed the early cases in Ex parte White, 33 Tex. Crim. Rep. 594, 28 S. W. 542, wherein a constitutional provision similar to the one here involved is also discussed. And in 1898 New York has announced a similar rule under identical statutory and constitutional provisions. See People ex rel. Lardner v. Carson, 10 Misc. 237, 30 N. Y. Supp. 817, affirmed on appeal in 86 Hun, 617, 35 N. Y. Supp. 1114, and reaffirmed on appeal in the New York court of appeals in 155 N. Y. 491, 50 N. E. 292, where both sides of the question are discussed and a strong dissenting opinion filed. The discussion in the New York case is mainly on the constitutional question involved, the dissent being placed wholly upon that ground. The facts in that case are best stated in the dissenting opinion, from which we quote: "At the time of said election the town of Lockport had been divided into two election districts, and the polling place for the first district, designated according to the city charter, was in a building situated within the city, known as No. 11 Main street, which was in the second election district of the first ward of the city of Lockport. The polling place for the second district designated in the same way was also inside the city limits, in a building known as No. 49 Locust street, which was in the first election district of the third ward in said city. Each of said polling places was about 1 mile from the nearest boundary of the said election districts of the town. The polling places for the city were distinct from those for the town, and no elector residing in the city voted at either of the town polling places, and no voter residing in the town voted at any of the city polling places." Thus, the voters of the first district were obliged to go into the second district to cast their ballots, and the voters of the second election district were likewise required to go into the first election district to vote. It is thus parallel to the voters in the first, second, and third wards of Devils Lake being required to cast their ballots without the limits of their wards and at the fire hall within the fourth ward, if we grant that ward lines are to be taken as defining the election districts, and then attempt to reason that § 121 of the Constitution, in defining a voter's qualifications, in the use of the term "shall be a qualified elector at such election," refers particularly to the election held in the precinct wherein he resides. We quote from the opinion in People ex rel. Lardner v. Carson: "We are told that the Constitution enacts that the elector must vote 'in the elec-

tion district of which he shall at the time be a resident, and not elsewhere.' So it does; but what is an election district, and by what power is it made, changed, or abolished? The Constitution has left all that to the legislature, and hence an election district is just what the legislature chooses to make it. In this respect it is supreme. It may say that the district shall be small or large, with such territory as it thinks proper, and it may even locate the polling places according to its own judgment and discretion. These details are sometimes delegated to local authorities, but it can confer no power upon them that it does not possess itself. If the district is so situated that there is no convenient place within it to hold an election, there is nothing in the Constitution that prohibits the legislature from authorizing the local authorities to locate the polling place on the other side of the imaginary line which bounds the district where there may be such a place. In a word, the whole subject of creating election districts and locating the polling places where the residents of the district may vote is with the legislature, and it may lawfully delegate this power to local authorities." And it will be noticed that our Constitution does not limit the local authorities in the establishing of the voting place to the establishment of a voting place in the precinct in which the elector resides. It does not touch upon that matter which is left wholly to legislative direction, which in turn, by § 742, has delegated to the council the power of designating the voting place "in each ward." "Except in cities where aldermen are elected at large, the council shall designate one polling place only." In which case the whole city shall constitute but one election district or precinct. In the language of the opinion in People ex rel. Lardner v. Carson: "There is nothing in the Constitution that requires the voter, when offering his vote, to stand on the soil embraced within the boundary lines of the district, or that prohibits the legislature from making a room or building in an adjoining district a part of the district where the voter resides, for the purpose of registering and casting his vote. All that the Constitution requires is that the elector must vote at the polling place designated by law for casting the vote of the district where he resides, and the validity of his vote is not affected by the circumstance that the place is located on the wrong side of an imaginary line. When he does that, he votes in the district of his residence, and not elsewhere, within the spirit and even within the

letter of the Constitution. . . . An arrangement made by law for enabling the citizen to vote should not be invalidated by the courts unless the arguments against it are so clear and conclusive as to be unanswerable." And, again, under the contention made that the law thus fixing the polling places was unconstitutional and void, that court says: "Finally, if it be granted that the contention of the relator be correct in its full length and breadth, it does not at all follow that votes cast at a lawful election by qualified electors at a place designated by an unconstitutional law are void. [Citing] People v. Cook, 8 N. Y. 67, 59 Am. Dec. 451; People ex rel. Watkins v. Perley, 80 N. Y. 624; People ex rel. Woods v. Crissey, 91 N. Y. 616; People ex rel. Angerstein v. Kenney, 96 N. Y. 294; Demarest v. New York, 147 N. Y. 203, 41 N. E. 405. . . . But if the courts should hold the law invalid as conflicting with the Constitution, would it follow that all votes cast or elections held under it were void? To so hold would invite not the reign of law, but of anarchy; since the decision carried to its logical consequences would overthrow every power of government, without the ability to substitute anything in its place. The truth is that neither the Constitution, nor any law, attaches such absurd consequences to the error in the location of a polling place. The object of the Constitution is to secure to every citizen the right to cast one honest vote. To that end it enacts that he shall vote at his own home with his neighbors, where he is known, and not at some other polling place, where he may not be known. But all this is fully complied with when he votes with his neighbors at the place designated by law for that purpose; and whether that place be located on one side or the other of an imaginary line bounding a town or district is not, in the constitutional sense, a matter of the slightest consequence."

And Peard v. State, 34 Neb. 372, 51 N. W. 828, is in line with our conclusions, that the electors of the city may legally vote outside their wards, assuming that by so doing they are voting outside their precincts. We quote: "The voting at the polling place outside the commissioner district is, at most, an irregularity not affecting the merits of the case. To reject the votes now would be not only to disfranchise the voters, but to defeat the will of the majority fairly and honestly expressed. The court will hesitate before adopting a construction that will be attended by such consequences. The rule may be said to be

well settled that courts will not disfranchise voters, when the election was fair and the result free from doubt, unless required to do so by the peremptory requirements of the law." 6 Am. & Eng. Enc. Law, 325, and note. The only decision we have been able to find supporting the appellant is Bean v. Barton County Ct. 33 Mo. App. 635, decided in 1889, but which is not mentioned in Bowers v. Smith, 111 Mo. 45, 16 L.R.A. 754, 33 Am. St. Rep. 491, 20 S. W. 101, from the supreme court of Missouri three years later, in effect at least overruling Bean v. Barton County Ct. But the decision in Bean v. Barton County Ct. is expressly placed upon insufficient notice of the election declared void. And McCrary on Elections, at § 228, while laying down the rule that the time and place of the election are generally of the substance of the election, qualifies it by the statement that "the principle is that irregularities which do not tend to affect results are not to defeat the will of the majority; the will of the majority is to be respected even when irregularly expressed." Nor do we regard Territory ex rel. Higgins v. Steele, 4 Dak. 78, 23 N. W. 91, as authority for plaintiff. There it was sought to sustain the action of the commissioners of Kidder county in an attempt to compel the people of the entire county to vote at one precinct, at the county seat, on the question of the issuance of bonds to build a courthouse, when the county had been divided into established election precincts with some of the usual voting places nearly 20 miles from the county seat. The fraudulent intent to prevent a full county vote was clearly apparent as the reason for fixing one voting place for an entire county on a county bonding question. The case before us is one concerning a special election for a city, and pertains to the municipality alone. No inconvenience of voters attending tended to restrain voting. There is a difference between requiring the people of such a limited area to vote at one voting place, from requiring the people of Ramsey county, for instance, to vote at one voting place. This distinction is too apparent for need of comment. Fraud there appeared as the reason for calling the election to be so held. Besides, prior to the enactment of chapter 65 of the Session Laws of 1911, no statute would have been disregarded had the election on this matter been conducted as it was, it being a special election; otherwise there was no necessity for the amendment to include such elections.

For another recent holding sustaining this opinion, and without

which a review of the authorities would not be complete, see State ex rel. Lane v. Otis, 68 N. J. L. 656, 54 Atl. 442, where an election was sought to be invalidated "because the polling place selected by the clerk, and advertised as the place for said voters to vote, was not in fact located within the territory . . . within the township voting district, but was in fact in a building situated within the territorial boundaries" in another borough. "There is no allegation of fraud on the part of anyone. Does the mere fact that a voting precinct or polling place has been selected outside the district defeat the whole vote cast at such polling place? That does not raise the question of one voter lawfully entitled to vote in one district voting in the ballot box of another district, but is the case of a voter voting at the polling place provided for him to vote at for the district in which he resides. . . . The voter must vote or be disfranchised at the place selected by the clerk and advertised as the polling place for the 'election district' in which he resides. These sections of the election law only fix the method of selecting the place and giving notice to the voter where he may lawfully vote as a resident of a particular election district. An error of the clerk in the selection of the place should not disfranchise the voter, no matter where the place is, if it is the place selected and advertised, and where the proper election officers conduct the election, and is the only place lawfully provided for the voters of that particular election district to vote at. The ballots thus cast are cast by legal voters, and cast at the place provided for that purpose by the officer charged with that duty by law. If a clerk by selecting a place just over an election district line could defeat the whole vote of the district, it would be putting a premium on fraud. The right of suffrage is too sacred to be defeated by an act for which the voter is in no way responsible, unless by the direct mandate of a valid statute, no other construction can be given. There is nothing in our election law which requires a rejection of votes honestly cast and counted in a case like the one before us." This was said in construing their election statutes, one of which there quoted, reads: "Every person possessing the qualifications required by the Constitution, and being duly registered as required by this act, shall be entitled to vote in the election district in which he actually resides, and not elsewhere," quoting from page 659 of the reported opinion. The decision is dated in 1903. Article 2 of the New Jersey Constitution, de-

claring the right of suffrage, merely defines the qualifications of electors, as does our own. But the statute quoted is fully as stringent as any we have. The New Jersey case cites and follows People ex rel. Lardner v. Carson, 155 N. Y. 491, 50 N. E. 292; Ex parte White, 33 Tex. Crim. Rep. 594, 28 S. W. 542, and Peard v. State, 34 Neb. 372, 51 N. W. 828.

We are aware Pennsylvania and Wisconsin holdings would, if followed, inject into this case a constitutional barrier to the validity of this election. We refer to the cases of Chase v. Miller, 41 Pa. 403; Re McNeill, 111 Pa. 235, 2 Atl. 341, and State ex rel. Wannemaker v. Alder, 87 Wis. 554, 58 N. W. 1045. Investigation will show that these decisions are under Constitutions which not only prescribe the qualifications of electors, but, as is said in Chase v. Miller, 41 Pa. on page 419, prescribe "a rule of voting also;" and the same reference is also made in the McNeill Case, 111 Pa. on page 237, 2 Atl. 341, wherein the court says the new Constitution of 1838 "introduces not only a new test of the right of suffrage, but a rule of voting also." In brief, § 6 of the Pennsylvania Constitution of 1776 merely prescribed an elector's qualifications. The same with the second Constitution of Pennsylvania of 1790. See § 1, art. 3, thereof. When the third Pennsylvania Constitution became effective in 1838 it contained a radically different provision, and, in addition to prescribing the qualifications of an elector, announced a rule for voting, as is declared by said decisions construing it. See § 1, art. 3, thereof, reading: "In elections by the citizens every white freeman of the age of twenty-one years, having resided in this state one year, and in the election district where he offers to vote ten days immediately preceding such election, . . . shall enjoy the rights of an elector." And the fourth Pennsylvania Constitution of 1873 still perpetuates this distinction by the words: "He shall have resided in the election district where he shall offer to vote at least two months immediately preceding the election." Sec. 1, art. 3, of the Wisconsin Constitution, is very similar to that of Pennsylvania. It reads: "Every male person of the age of twenty-one years or upwards . . . who shall have resided in the state for one year next preceding any election, and in the election district where he offers to vote . . . not exceeding thirty days, shall be deemed a qualified elector at such election." Obviously the words, "where he offers to vote," must have some

significance. They are not in our constitutional provision, which defines merely an elector's qualifications, leaving the time, place, manner of voting, boundaries of election precincts, and kindred matters to legislative enactment without constitutional restrictions, so long as suffrage is not abridged. These cases may be distinguished on other grounds also, but the constitutional distinction is clear. And the New York, Texas, Missouri, and New Jersey cases decided under constitutional definitions of an elector similar to our own must be followed. We might call attention that cases opposed to the Pennsylvania cases cited may be found from that state, as are noted and cited in 10 Am. & Eng. Enc. Law, 2d ed. 688; at which place also is cited Bean v. Barton County Ct. 33 Mo. App. 635, the lone case appearing to support appellant's contention, but no reference is there made to Bowers v. Smith, 111 Mo. 45, 16 L.R.A. 754, 33 Am. St. Rep. 491, 20 S. W. 101, in effect a contrary holding to the earlier case of Bean v. Barton County Ct. Minnesota is in line with our holding. See Stemper v. Higgins, 38 Minn. 222, 37 N. W. 95.

It is urged that § 8597 of the Penal Code applies, reading: "Every person who, at any election, knowingly votes or offers to vote in any election precinct or district in which he does not reside, or in which he is not authorized by law to vote, is guilty of a misdemeanor." But in this section is drawn a distinction between the district in which he resides and in which he is authorized by law to vote. And in any event the penal provision could not here apply, as no one would say that the voters generally, by voting, each committed a crime, because the voters in certain wards followed the direction of the lawful authorities calling the election, and making the city one *de facto* voting precinct for this city election, by requiring that all voters vote at one central polling place. In law, four polling places should have been opened and four precincts should have existed for this election, but in fact but one voting place was opened, and but one precinct or election district did actually exist, composed irregularly of a combination of all election districts or wards of the city. The penal provision does not apply to the voter who votes at the same place fixed by lawful authority to vote, as do all the electors in the precinct in which he resides. Every elector in Devils Lake who voted at this central voting place voted in the precinct of his residence, within the meaning of the provision of the Con-

stitution defining an elector. People ex rel. Lardner v. Carson, 155 N. Y. 491, 50 N. E. 292; State ex rel. Lane v. Otis, 68 N. J. L. 656, 54 Atl. 442. And the election must stand or fall according as it be, as a whole, determined to be irregular or void *ab initio*. We believe that, in the absence of any statutory provisions expressly declaring an election so held to be invalid, we must hold the election legal and valid under this attack, following the reasoning of State ex rel. Byrne v. Wilcox, 11 N. D. 329, 91 N. W. 955; Davis v. State, 75 Tex. 420, 12 S. W. 957, followed in Ex parte White, 33 Tex. Crim. Rep. 594, 28 S. W. 542; Bowers v. Smith, 111 Mo. 45, 16 L.R.A. 754, 33 Am. St. Rep. 491, 20 S. W. 101, the doctrine of which is expressly approved in Perry v. Hackney, 11 N. D. 148, 90 N. W. 483, and again followed in State ex rel. Byrne v. Wilcox, supra; and People ex rel. Lardner v. Carson, 155 N. Y. 491, 50 N. E. 292; and State ex rel. Lane v. Otis, 68 N. J. L. 656, 54 Atl. 442.

The foregoing authorities are distinguishable from holdings similar to Elvick v. Groves, 17 N. D. 561, 118 N. W. 228, and State ex rel. McCarthy v. Fitzgerald, 37 Minn. 26, 32 N. W. 788, cited by appellant. The latter case is a holding declaring a statute unconstitutional making no provision for the exercise of the right of suffrage and in effect disfranchised those having such right. No one is claimed to have been disfranchised in this city election, and the case is not in point. In Elvick v. Groves, supra, to which we might add the recent Burke county-seat case of State ex rel. Johnson v. Ely, 23 N. D. 619, 137 N. W. 834, a different principle was involved than before us in this case. In those cases the precinct officers and electors arbitrarily, and for mere convenience and without necessity, held the election in the precincts concerned at a different voting place than that fixed by the county commissioners as the official voting place. In Elvick v. Groves, reading from page 565 of the report, "the established voting place was arbitrarily changed to a place between 3 and 4 miles distant. No excuse is shown except that it was deemed by the electors at the meeting that resolved in favor of the change that schoolhouse No. 3 was a more convenient location for the electors generally. We do not think the question as to which is the most convenient place for a voting place should be left to the judgment of the voters independently of or contrary to the judgment of the county commissioners. On that question

we think the action of the county commissioners should be deemed final, and not subject to change by the authorities except under extraordinary circumstances. Circumstances may arise making a change absolutely necessary, but the question of convenience should not be considered an excuse or justification for the setting aside of the official action of the proper authorities on so important a question as the establishment of a place for voting in a precinct." The court cites Knowles v. Yeates, 31 Cal. 83, where the precinct election was held 6 miles from the voting place officially designated. Thus, it will be seen this court there was asked to decide and establish precedent thereby as to whether, for a mere supposed convenience of the voters, with no question of necessity involved, official discretion and action of the lawful authority establishing the official place for voting could, by mere caprice and for mere convenience, be overridden by the election officers and electors voting. If, in the Elvick v. Groves Case the vote had been upheld, it would have meant that the official action of the county commissioners in designating the voting places meant but little; and our court, following the weight of authority, sustained official action. But these cases, by their terms, do not apply to an election held at a place changed under force of necessity, as where the building to be designated as the official voting place and to be occupied for such purposes had, prior to election, burned or been removed. In the case before us the election was noticed, by the proper officer to give notice thereof, that it would be held at the one central voting place for the entire city. While the record is silent as to the authority under which it was noticed, we must assume, inasmuch as the authority of the clerk to notice the same is unchallenged, that the election so noticed was in obedience to the direction of the city council, and that the election was so held and conducted pursuant to order of the lawful municipal authority to call and conduct the same. The voters, then, as is said in the New Jersey case cited, must have voted there, or not at all. They have but complied with the election requirements in so voting, and have not disregarded any official action; and the validity of the election is not measured by any irregularity, misconduct, or omission on the part of any of the election officers, but must stand or fall upon the disregard, by the proper municipal authorities calling the election, of ward lines, and their failure to open places for voting in each ward. The determination of this ques-

tion must be decided by different principles than apply to the mere conduct of a precinct election.

But appellants urge that the election must fall because more than 100 voters named in the complaint were allowed to vote at said election without being "registered as required by chapter 128 of the Laws of 1911," and "without furnishing to the judges of said purported election their respective affidavits containing a statement to the effect that they, or either of them, were residents and voters of the precinct in which they were allowed to vote, and without showing by such affidavit that they were qualified voters of said city, and without proving, by the oath of a householder or registered voter, that they or either of them were qualified voters in said purported election; and plaintiff alleges that a great many of those not registered as required by law, and who were allowed to vote at said purported election, were not then and there qualified voters of the city of Devils Lake." Then follows the names of 193 of such purported voters. Upon this portion of the complaint, appellant assigns error in that the persons named, in voting at the central polling place, voted without the limits of their precincts, and hence were not registered voters of the precinct in which they cast their votes; and in support thereof cites the penal statute, § 8797, Rev. Codes 1905; and also § 7242, Rev. Codes 1905, that the annual elections in such cities shall be held "at such place or places in each ward as the council shall designate." Fitzmaurice v. Willis, 20 N. D. 372, 127 N. W. 95, a holding upon a general election, is cited as invalidating this special election, because of want of registration prior to the election. Much said heretofore upon the validity of the election here applies.

This assignment must fall when we fail to find any provision of law requiring a registration prior to a special election held for this purpose. Such an omission is probably the result of legislative oversight, but is something that the courts cannot cure without in fact legislating. Prior to chapter 65 of the Session Laws of 1911, § 2743, regulating city election districts, was silent as to the boundaries of said districts, except for state and county elections, leaving special and school elections in cities to other regulations as to wards and voting precincts. Then chapter 65 of the Session Laws of 1911 brought city and school elections under the provisions of law as to wards and elec-

tion precincts governing county and state elections. But prior to such amendment, § 2744, Rev. Codes 1905, provided "that the city council shall provide for the registration of all voters as required by the laws of the state," which had particular reference to §§ 732 to 746 inclusive, being art. 16, entitled "Registration of Voters," of chap. 8, of the Political Code and governing elections. A reference to §§ 732 et seq. discloses registration to be required for "any general election or annual city election" only; and the original section, 738, amended by chapter 128 of the Session Laws of 1911, concerned only such elections, the general election or the annual city election, to vote at which registration was required. Hence chapter 128 thereof, containing the words, "no vote shall be received at any election in this state if the name of the person offering such vote is not on the register," and following provisions, has no application to a special city election, and cannot broaden the provisions of the article, especially when we find that nowhere in the law is there any specific requirement for registration to vote at a special city election, nor is there any time provided at which such registration shall be had prior to a special city election for bonding purposes, nor is the time specified at which registration must be had except prior to general and annual city elections, under the provisions of §§ 732 and 735, Rev. Codes 1905. None of the statutes as to registration apply to special city elections for purposes such as bonding. So that the provision of § 2744, providing that the city council "shall provide for the registration of all voters as required by the laws of this state," is not applicable to this special election, inasmuch as there is no law of this state authorizing registration in advance of such an election. And this is borne out by the plain provisions of § 2749, Rev. Codes 1905, providing that the city council, "in all cases when necessary for the purposes of this chapter, may call special elections, canvass the returns thereof, and provide by ordinance for the mode of conducting the same; and shall give notice of such special elections, in which shall be stated the questions to be voted upon, and cause such notices to be published for the same length of time and in the same manner as is required in the case of regular annual elections in such city, unless herein otherwise provided." And we find this election is authorized specifically under the provisions of art. 4, empowering the submission of this question "at a

general or special election" to the voters of the municipality. So, the election was called, in one of the cases, "necessary for the purposes of this chapter," and was a valid special election so far as authority to call the same was concerned. And the only conclusion we can arrive at is that either by legislative oversight no provision for registration at this special election is provided by statute, or else it was purposely left to the city council to provide by ordinance for such registration, under the provisions of § 2749, authorizing it by the words, and "provide by ordinance for the mode of conducting the same," referring specifically to special elections so-called when necessary for the purposes of the chapter in question. The pleadings and affidavits do not disclose whether any ordinance existed requiring registration in advance of this election. Hence, the assignment based upon an erroneous supposition that registration was a requisite to a valid election must fall.

Then, again, appellant in his complaint alleges "that at said purported special election the following who were not qualified voters or electors in the city of Devils Lake were allowed to vote." Then follows the names of twenty-one persons. Upon this allegation appellant, in assigning error, reasons that six of these illegal voters may have voted for the increase in the debt limit, without which illegal votes the necessary two-thirds vote to authorize such increase, under § 2678, Rev. Codes 1905, would not have been had. Needless to say this assignment is based upon no allegation to that effect in the complaint, granting that the election could be so assailed. Should proof be made on trial that twenty-one persons, not legal voters, participated in such election, that would in nowise invalidate the election, or raise any inference in the absence of further proof of fraud in the conduct of the election, or that the fraudulent votes would in fact change the result thereof. Neither fraud nor that the result was changed is here alleged. And if we would, under such circumstances, purge the returns of such illegal votes, by deducting from both the affirmative and the negative that proportion of the twenty-one votes assumed to be illegally cast, proportionate to the total vote that each affirmative and negative total bears to the total number voting, the rule prescribed by McCrary on Elections, § 495, applicable under some circumstances, a two-thirds majority would still remain in favor of the increase in

the debt limit; so that result would not be affected, even though we treat this allegation of the complaint as sufficient to authorize the casting out of twenty-one illegal votes.

Appellant also urges that there was a defective publication of notice of election, because the newspaper in which it was published had never been designated as the city official newspaper. We do not think it necessary to the validity of the notice that it be published in the official newspaper of the city. Sec. 2678, Subdiv. 5, provides that the election shall not be held until "after twenty days' notice in a newspaper published in the city." It was so published. The statute was complied with. But the newspaper in which such publication was made was the official city paper, so designated under § 2677, at a meeting held sometime in October, instead of in May. The time direction in this statute is directory, like most time requirements. The statute, from its terms, would bear no other construction, it providing for designation by the council "at its first meeting in May, or as soon thereafter as practicable" of the city newspaper.

We now approach questions more difficult of solution. Appellant maintains that, though the election as such was valid, nothing was authorized thereby. That fatal defects exist, in that the resolution of the city council authorizing the submission of the issuance of these bonds to the people for authorization by them, under § 2678, Rev. Codes 1905, is a nullity, because (a) it was not passed as an ordinance, but instead is simply the resolution of the city council; (b) that the resolution is fatally indefinite in the amount of the proposed bonded indebtedness to be submitted to ballot; (c) that the ballot itself is void as indefinite in the amount of bonds authorized; (d) that the notice given of the special election did not inform the voters that an election would be held to submit to them the question of bonding for a certain determined amount, as required by statute; and also that the resolution calling the election was insufficient because of the foregoing particulars to authorize the legal notice to be given of the special election; (e) that because of the form of the ballot, grouping together and thereby exacting a vote upon propositions jointly that should have been voted upon separately, no expression of popular will was had upon either of the two questions submitted, and the election falls.

The city council by resolution found the necessity for the establish-

ment of a municipal electric lighting plant for the city, and that one could be established, "abundantly sufficient to supply the city of Devils Lake for lighting and power purposes" . . . at a cost of "not to exceed $33,000," and that the assessed valuation of the city for that year was $1,154,000; that it was necessary for the welfare of the city and its inhabitants that such municipal light plant should be established. And further that:

"Be it further resolved that the following question be submitted to the legal voters of the said city: 'Shall the city of Devils Lake be authorized to increase its indebtedness 3 per cent on its assessed valuation, beyond the 5 per cent limit now prescribed by law, for the purpose of establishing a municipal light plant for said city, and said city be authorized to issue bonds for said indebtedness in the sum of $33,000, drawing interest at the rate of 5 per cent per annum, payable annually, said bonds to be issued for a period of twenty years, the denomination of said bonds to be one thousand dollars ($1,000) each.' "

It will be noticed that this resolution contemplated the subm ission of a question of increasing the indebtedness and also the issuance of $33,000 worth of bonds described, as a separate matter, both for the specified purpose of establishing a municipal light plant. Then followed a resolution fixing the form of the ballot. Pursuant to this resolution, notice of such special election was given, that it was to be held November 5, 1911, for these specified purposes, and at the one central voting place. Then followed in the notice of election the recital of the same form of ballot as fixed by the resolution of the city council. The notice of election was definite as to time and place of holding, and as to the question of increase of indebtedness, and also definite as to the sum ($33,000) for which bonds were to be issued.

The official ballot used at the election reads as follows:

Shall the city of Devils Lake be authorized to increase its indebtedness and to issue its bonds therefor in an amount equal to 3 per cent of its assessed valuation over and above the 5 per cent limit of indebtedness on the assessed valuation as now provided by law, in accordance with the provisions of subdivision 5, of § 2678, of the Rev. Codes of North Dakota for the year 1905, for the purpose of establishing a municipal light plant and of issuing bonds therefor in a sum not to

exceed said increased indebtedness; said bonds not to exceed $33,000; which bonds shall be in a denomination of $1,000 each, drawing interest at the rate of 5 per cent per annum, payable annually, and said bonds to be issued for a period of twenty years?

In favor of said increased indebtedness and issuance of bonds... ☐
Against said increased indebtedness and issuance of bonds ..... ☐

More than two thirds of those voting at the election voted "in favor of said increased indebtedness and issuance of bonds." This ballot thus submitted two questions: (1) Whether the debt limit should be increased as authorized by the Constitution and statute; and (2) whether bonds therefor, in an uncertain amount "not to exceed $33,000," should be issued, all for the purpose expressed "of establishing a municipal light plant and paying therefor." It was sought to combine two elections. The Constitution and the statutes undoubtedly contemplate two separate elections, although both may properly be consolidated and held as one when a separate vote on each question is permitted. The Constitution, § 183, authorizes a city by a two-thirds vote to increase its indebtedness 3 per cent beyond an existing 5 per cent limit of indebtedness. The statute, subdiv. 5 of § 2678, provides the restrictions under which this may be done; and subdiv. 11 empowers the city council to build such a municipal lighting plant. To increase such debt limit an affirmative two-thirds vote is required. After the limit of indebtedness has been thus increased to a total of 8 per cent of the city's assessed valuation, the city is authorized to incur an indebtedness to that limit for such purposes.

Both counsel have submitted this case upon the theory that the election must fall as to both propositions, if either increase of debt limit or authorization of bond issue be invalid. Examining the election as to each, we find the bond election defective in the form of ballot used. In the resolutions and notice of election, the question of increase of indebtedness is definitely and separately stated. As to the ballot used both propositions are attempted to be set forth, the only uncertainty arising from the use of the words, "not to exceed $33,000," as the amount in which bonds are to be authorized. There is no uncertainty in the submission of the question as to the 3 per cent increase of the debt limit. The election, unless invalid for other reasons, must have

authorized at least an extension of the debt limit. As to the issuance of bonds, the resolution authorized the issuance in a definite amount "in the sum of $33,000." And the notice of election was equally definite. The uncertainty in the matter of amount was caused by the official ballot using the words, "said bonds not to exceed $33,000." Under the statute cited, as construed in Stern v. Fargo, 18 N. D. 289, 26 L.R.A.(N.S.) 665, 122 N. W. 403, we must hold that such portion of the ballot as to bonding did not authorize the issuance of a bonded indebtedness for a definite amount, but instead sought to delegate a nondelegable matter to the city council, *i. e.*, the determination of the amount of the bonds to be issued, the words, "not to exceed $33,000," not definitely stating the amount "for which said bonds are to be issued" to comply with the requirement of subdiv. 5, of § 2678, Rev. Codes 1905. The reasons are stated in Stern v. Fargo. We are aware that there are two lines of authorities on this question, but our court is committed by that holding. Respondent, to avoid this precedent, contends that what was there said was with reference to the notice of election, and that as the resolution and notice of election in this case are specific in the amount of bonds authorized, any uncertainty in the ballot in this respect is but an irregularity. But the ballot is the instrument by which the voters empower the city council as their agent to incur the indebtedness. The voter does not merely assent to the exercise of a power existent in the council, but, instead, delegates a power to it. In order to clothe the council with this power, it is necessary that the ballot, provided by law with which to confer it, shall be as definite as to the amount for which the indebtedness is authorized as it is that the manner of creation of the debt by issuance of bonds should be definite. The city has no implied powers in these respects. Stern v. Fargo, supra; 1 Dill. Mun. Corp. 5th ed. §§ 237 et seq. If it is necessary, as held in Stern v. Fargo, that the notice of election shall definitely state the amount of the proposed indebtedness to be passed upon by the election, it certainly is necessary that the ballot be equally definite in such particular. The statute must be construed as applying to the substance of the ballot, and that, by failing to definitely specify the amount of bonds to be authorized, the election as to bonds is invalid under this direct attack thereon.

But does the submission of both propositions, the increase of the debt

limit and the issuance of bonds upon one ballot in the form submitted, invalidate the entire election or only the bond issue? The election to increase the debt limit, as heretofore stated, was called in compliance with a constitutional provision, § 184 thereof. Concerning this, Dillon on Municipal Corporations, 5th ed. § 213, says: "Although the Constitution may not contain any direction as to the manner in which the question shall be submitted, other than that the assent of the voters shall be obtained at an election 'for that purpose,' it is implied in the constitutional direction that the voters shall be permitted to express their opinion on the question of creating the indebtedness *per se,* disconnected from any other district and different proposition, which may be submitted for their consideration, not related to the subject of incurring the debt. But the project or improvement . . . with which it is proposed to incur the debt, and the debt itself, have a necessary relation to each other, and they may be submitted together although the opinion has been expressed that even in such cases the better practice would be to provide for separate elections on these questions." It will be noted that this rule does not prohibit the voters from expressing their opinion at the same time upon this question of bonding, provided they may so express their opinion separately upon the questions submitted. Accordingly it was proper that the ballot should also state that the purpose for the authorization of the 3 per cent increase of indebtedness was to establish a municipal light plant.

Concerning the dual propositions voted upon at the election, the ballot specified clearly both questions,—(1) the increase of the debt limit, and (2) the issuance of bonds should the debt limit be increased. Does the failure of the bond question, because of the ballot being indefinite in amount of bonds to be so authorized, invalidate also the election as an expression of a desire to increase the debt limit? We cannot see how the bond question has prejudiced the election upon the increase of the debt limit. Every voter was charged by law with knowledge that the primary purpose of the election was to increase the debt limit, and must have known, as a matter of law, that without that increase no bond issue could be authorized. Hence the bond issue being dependent for validity wholly upon the constitutional increase of the debt limit, in nowise could affect the decision of or influence the voters in voting upon the question of whether the constitutional

increase should be had or not. To illustrate, if the voter was in favor of the issuance of bonds, he must also be in favor of increasing the debt limit, otherwise we must presume him to be ignorant of the law. So, too, if the voter be favorable to both issuance of bonds and increase of the debt limit, he has but expressed his opinion when he votes affirmatively on both propositions at once. Then, again, if he is in favor of an increase of the debt limit, but against the increase of bonds, but for any reason because of the debt limit feature is induced to vote for the bonds as well as the debt limit increase, nevertheless he has in fact expressed but his opinion upon the increase; and the only prejudice he, as a voter, has suffered, has been to vote for the bond issue which he did not desire. The voter, then, in voting for an increase of the debt limit, has been neither influenced for nor prejudiced by the bond question, unless you impute to him ignorance of law, which is contrary to the controlling presumption that every man is supposed to know the law. Of course, if the voter was against increasing the debt limit, as 156 of them were at this election, he had the opportunity to vote against the debt limit and has availed himself of it. And no voter can be presumed to be so ignorant of the law as to be against the debt limit and still be for the issuance of bonds, to consummate which would contemplate a legal impossibility. This covers every phase of the ballot situation from the voter's standpoint. Our conclusion is that it is self-evident that no voter could be misled by the form of the ballot requiring a vote for or against both propositions and without separating them. The questions should have been so submitted that each could have been voted upon separately. But the election is as to increase of the debt limit a valid expression of the popular will, and a valid increase of the debt limit for the purpose. As authority for sustaining an election under such circumstances, see State ex rel. Canton v. Allen, 178 Mo. 555, 77 S. W. 868–875; and Thompson-Houston Electric Co. v. Newton (C. C.) 42 Fed. 723.

Finally it is urged that the election was unauthorized because it was brought about by a resolution of the council, instead of under a city ordinance. Appellants urged that the charter clothed the city council with general power to provide for lighting the city, but as to the mode of carrying it into effect it was powerless to exercise that right except through the medium of ordinances duly passed under the pro-

visions of subdiv. 77, of § 2678, and § 2679, Rev. Codes 1905, and cite in support of their contention Engstad v. Dinnie, 8 N. D. 1, 76 N. W. 292; and Roberts v. Fargo, 10 N. D. 230, 86 N. W. 726. We cannot agree with this construction of the law. It will be noted that, concerning the exercise of the powers conferred upon the city council to submit to the municipality these questions, at no place is it expressly required that it shall be done by ordinance. Section 2679 provides: "When by this chapter the power is conferred upon the city council to do and perform any act or thing, and the manner of exercising the same is not specifically pointed out, the city council may provide by ordinance the details necessary for the full exercise of such power." This confers upon the city council the power of controlling the details of the execution of its power by ordinance; but among the powers of the council is subdiv. 5 of § 2678, authorizing the increase in the limit of indebtedness and an election for voting bonds. This provision itself provides all the essential details, and leaves little, if anything, to the necessity of regulation by ordinance, and hence no necessity exists for an ordinance on the subject. Concerning such an election 28 Cyc. 549, announces the rule to be, "A resolution or order authorizing an election is sufficient where a formal ordinance is not expressly required." Citing Hamilton v. Detroit, 83 Minn. 119, 85 N. W. 933; and State ex rel. Canton v. Allen, 178 Mo. 555, 77 S. W. 868.

Concerning this question, vol. 2, of 5th edition of Dillon on Municipal Corporations, at §§ 571, 572, also effectually answers the point urged. We quote: "It has been said that a resolution is an order of the council of a special and temporary character, while an ordinance prescribes a permanent rule of conduct or government. This statement of the characteristics of resolutions and ordinances points out generally the proper province of these forms of municipal action." Our statute is silent as to whether a resolution or ordinance shall be passed as a basis for increasing the debt limit and for bonding. To hold a resolution necessary, we would, by construction, apply a general statute governing ordinances to this particular subject-matter. To do so would violate the general rule as announced by Cyc., and also by § 572 of Dillon, which reads: "The general rule has been laid down by many decisions, that when the charter commits the decision of a

matter to the council, and is silent as to the mode,—neither expressly nor by necessary or clear implication requiring the action of the council to be in the form of an ordinance,—the decision of the council may be evidenced by resolution, and need not necessarily be by ordinance. This rule has been laid down without any qualification restricting it to those acts and decisions which are of a special and temporary nature, and which do not involve any permanent rule of conduct or government,"—citing cases from many states on bonding matters, waterworks, and light contracts, including National Tube-Works Co. v. Chamberlain, 5 Dak. 54, 37 N. W. 761; Crawfordsville v. Braden, 130 Ind. 149, 14 L.R.A. 268, 30 Am. St. Rep. 214, 28 N. E. 849; Board of Education v. DeKay, 148 U. S. 591, 13 Sup. Ct. Rep. 706, 37 L. ed. 573, 13 Sup. Ct. Rep. 706; Alma v. Guaranty Sav. Bank, 8 C. C. A. 564, 19 U. S. App. 622, 60 Fed. 203; Illinois Trust & Sav. Bank v. Arkansas City, 34 L.R.A. 518, 22 C. C. A. 171, 40 U. S. App. 257, 76 Fed. 271; Roberts v. Paducah, 95 Fed. 62; Ogden City v. Weaver, 47 C. C. A. 485, 108 Fed. 564; Los Angeles Gas Co. v. Toberman, 61 Cal. 199; Pollok v. San Diego, 118 Cal. 593, 50 Pac. 769; Smalley v. Yates, 36 Kan. 519, 13 Pac. 845, same case in 41 Kan. 550, 21 Pac. 622; Lincoln Street R. Co. v. Lincoln, 61 Neb. 109–144, 84 N. W. 802; State, Van Vorst, Prosecutor, v. Jersey City, 27 N. J. L. 493; Burlington v. Dennison, 42 N. J. L. 165; Brady v. Bayonne, 57 N. J. L. 379, 30 Atl. 968; Porch v. St. Bridget's Congregation, 81 Wis. 599, 51 N. W. 1007; Green Bay v. Brauns, 50 Wis. 204, 6 N. W. 503, and other cases. See also Seymour v. Tacoma, 6 Wash. 138, 32 Pac. 1077.

As to the cases cited by appellant, we do not consider them in point. Both were construing § 2262 of the Rev. Codes of 1895 (§ 2753, Rev. Codes 1905), requiring the council to pass an ordinance to determine the annual appropriation bill in which it "may appropriate such sums of money as may be deemed necessary to defray all necessary expenses and liabilities of such corporation," with other sections of the statute involved; and it was held that a mere resolution did not comply with the express provisions exacting an ordinance in such cases. Plainly these cases have no application to the election matter before us.

It is urged by appellant that "in order to carry the proposition of

issuing bonds for increased indebtedness over the debt limit, under subdiv. 5 of § 2678 of the Code, the same must receive enough votes to constitute a majority of all the legal voters in the city, whether voting or not." We are not concerned with the construction of § 183 of the Constitution, providing that "any incorporated city may, by a two-thirds vote, increase such indebtedness." But the assignment is based particularly upon the statute quoted, which provides that a bond issue for such purposes can only be had after "the legal voters of such city shall, by a majority vote, determine in favor of issuing such bonds." We do not pass upon this assignment, it being unnecessary to do so, holding as we do that the proposed bond issue was invalid because of fatal defect in the form of the ballot. It is unnecessary to construe this statute. There is no certainty of it being raised should an election hereafter be had upon the issuance of such bonds.

Of course the fact that this is a special election, instead of a general one, is immaterial, and makes no difference in the application of the principles of law involved. Distinctions between special and general elections concern only the steps taken in advance of the election, such as giving notice of time, place of holding, and objects of the election. As to the validity of the election held after proper notice and for lawful purposes, after authorization by the constituted authority, and regularly conducted, no distinctions can be drawn between special and general elections. Ex parte White, 33 Tex. Crim. Rep. 594, 28 S. W. 542, supra, is a decision upon a special election.

This disposes of all questions before us. Under the pleadings, upon the admitted facts and the issues of law arising therefrom, and assuming that the proof on trial on the merits will present the same facts and issues now before us, our holding would be, as it is, that the election held was valid and resulted in increasing the debt limit 3 per cent over the existing 5 per cent of indebtedness for the purpose of establishing this municipal lighting plant; but that the city council have not been authorized by the voters to incur such indebtedness for such purpose by bonding or otherwise, the election as to such bonding question being as to that invalid because of the fatal defect of uncertainty in the ballot as to the amount of bonds authorized for such purposes. Therefore the order appealed from, of date of February 5, 1912, dissolving and vacating the injunctional order pending trial and

final disposition of the action, should be vacated, and the injunctional order restraining the issuance and sale of the proposed bonds based upon the election had, purporting to authorize the same, should be reinstated: *Provided, however,* that such order shall not restrain the city, its council, or officials from taking steps necessary to the holding of an election at which to submit to the electors of said city the question of whether bonds in an amount certain, not exceeding the debt limit of said city as increased, shall be issued for the purpose of establishing such municipal light plant; this judgment shall not prejudice the rights of the parties in the entry of final judgment herein, except that the court shall not, after this appeal, permit the trial on the merits of new issues not within the scope of the pleadings, nor permit amendments to the pleadings to bring in other matters after the parties hereto have so stood on appeal upon the issues as so framed. Judgment will be entered accordingly. Appellant will recover judgment against defendant city for costs and disbursements on this appeal.

SPALDING, Ch. J. (dissenting). Section 183 of the Constitution prohibits the debt of any city from exceeding 5 per cent upon the assessed value of the taxable property therein, with this proviso, that any incorporated city may, by a two-thirds vote, increase such indebtedness 3 per cent on such assessed value beyond such 5 per cent limit. The same section makes all bonds or obligations in excess of the amount of indebtedness permitted thereby, void. The city of Devils Lake, having incurred indebtedness to the 5 per cent limit, and its officials, desiring to increase the debt an additional 3 per cent for an electric light plant, decided to submit it to a vote of the electors of the city. Accordingly the city council adopted a resolution intended to cover the subject and provide for a vote on the question of the increased indebtedness and the issuance of bonds therefor if it should carry. This resolution called a special election for the purpose of determining the question, and fixed the date as Monday, the 6th day of November, 1911, and provided for giving notice of such election. The council, as shown by the record, failed entirely to designate the polling places at which such election should be held. The resolution in no manner indicated that it should be called or held except as required by law, in each of the several precincts, which were the four

wards of the city. The auditor, however, in publishing the notice of election, assumed the unwarranted power to himself to fix the place for holding the election, and, instead of notifying the electors that the polling places would be the usual polling places in the precincts or the polling places theretofore established, which would continue to be such in the absence of new designations by the council, noticed it to be held at the fire hall in the city of Devils Lake, thus attempting to establish only one polling place for the four precincts; and the only votes cast in the entire city were polled at that place. I gather from the records that those persons who were the proper officials for the first ward in which the fire house was located acted as the election officials, and that the fire house was the usual polling place for that ward.

In determining the validity of the election, no question regarding the constitutionality of any statute is involved, and, to my mind, the only question is, Was it a legal election? The opinion of my brother Goss holds that it was not legally held, but that it was, nevertheless, valid, because the failure of the council to designate the places for voting, the assumption of authority on the part of the auditor to perform the duty imposed upon the council, and the wrongful designation of the polling place by him, and the casting of the vote of the entire city in one precinct through one set of officers, only amount to an irregularity. To this I cannot agree. It appears to me that a most serious and dangerous precedent is furnished by such opinion. It also seems to be in fact, though not so stated, grounded upon an assumption which is prevalent in these days among laymen, namely, that the right to vote is a natural or inherent right, and that the losing by one or a few persons of their votes is a more serious matter than the protection of the integrity and the purity of the ballot and the ignoring of means provided to that end by limitations and regulations of the exercise of the franchise. That the right to vote is not an inherent or natural right, but is conferred solely by the Constitution or laws, as the case may be, and regulated by the legislature in the interest of good order and honesty, in so far as not in conflict with the Constitution, and is but a political privilege, has been established in many states. I cite only a few of the many authorities to that effect: Chamberlain v. Wood, 15 S. D. 216, 56 L.R.A. 187, 91 Am. St. Rep. 674, 88 N. W. 109; Gougar v. Timberlake, 148 Ind. 38, 37 L.R.A.

644, 62 Am. St. Rep. 487, 46 N. E. 339; Frieszleben v. Shallcross, 9 Houst. (Del.) 1, 8 L.R.A. 337, 19 Atl. 576; People v. Barber, 48 Hun, 198; Spencer v. Board of Registration, 1 MacArth. 169, 29 Am. Rep. 582; Minor v. Happersett, 21 Wall. 162, 22 L. ed. 627; Anderson v. Baker, 23 Md. 531; Bloomer v. Todd, 3 Wash. Terr. 599, 1 L.R.A. 111, 19 Pac. 135; Cooley, Const. Law, 260; Story, Const. §§ 577–584; Black, Const. Lim. 752; 2 Bryce, Am. Com. 437; 2 Lieber, Misc. Writings, 204, 205; Blair v. Ridgely, 41 Mo. 161, 97 Am. Dec. 248.

Certain principles which to me seem well established or evident are applicable to this case. (1) Doubtful claims of power or duty, or ambiguity in the terms used by the legislature, are to be resolved against a municipal corporation. Stern v. Fargo, 18 N. D. 289, 26 L.R.A.(N.S.) 665, 122 N. W. 403. (2) In this case the bonds have not been issued, and the Constitution and statutes providing for the issuance of municipal bonds are more strictly construed in actions to prevent their issuance than in actions to prevent their payment after they have been issued and negotiated. Ibid. (3) The duties of the city auditor in issuing the notice of a special city election in which the electors are to vote upon the issuance of bonds or the increase of municipal indebtedness are purely ministerial. And such notice must follow the terms and conditions of the resolution authorizing the election. Ibid. It follows from this established proposition that the insertion, in the notice calling the election, by the auditor, of the designation of the one polling place, was wholly without authority, and rendered such designation absolutely void and of no effect. The resolution of the council did not provide for it. (4) Most authorities sustaining elections held at a place not authorized by law or by lawful authority relate to general elections. The time for general elections is fixed by law, and all electors are presumed to know when they occur, regardless of notice. For this reason many defects in the proceedings relating to general elections are disregarded by the courts which, when the same irregularities or defects relate to a special election, render the special election invalid. As a general election can only be held on a certain day fixed by law, and because such election is general throughout the state, and the loss of a vote or votes in a part of the state cannot be remedied by holding another election, the courts overlook or palliate

many irregularities. The reasons for doing this do not apply in the case of a special election to vote on one subject in the limited territory comprised in four precincts, all in one city, as the only effect of a failure to hold a valid election in such case is that the city has incurred the expense, and some voters the inconvenience occasioned by the election, and another can be called and the same question again submitted; and when a matter of as great importance to a small city as the extraordinary increase of indebtedness beyond the ordinary limit fixed by the Constitution and the statute is involved,—a question in which every taxpayer is interested, and one to which each must contribute of his substance if it carries,—the requirements of the statute should be complied with with a reasonable degree of strictness and regularity. This is especially true when the acts in question are required or prohibited, because their performance or omission has a tendency to lessen the protection intended to be afforded the public against fraud and corruption.

(5) With these observations regarding established or self-evident principles, I proceed to consider briefly the questions that seem to me directly involved in this election. The first relates to the qualifications of an elector. The framers of the Constitution, and the people who adopted it, were mindful of the general demand existing at that time for greater protection to the ballot than had prevailed during territorial times. Stories were current of gross frauds perpetrated in the elections of the territory, and particularly in county and city elections. Many of these frauds were alleged to consist in the colonization of voters, the transportation of section crews working on railroads, into precincts, over night before election, and voting them where their votes would do the most good, the importation of men from other counties into those where the election was supposed to be close, the herding of transients in "blocks of five" or in greater numbers, in wards of cities where their votes might be needed to elect aldermen, and similar offenses against the elective franchise. In an attempt to remedy this, through the Constitution, the qualifications necessary to entitle one to vote were prescribed by article 5 of that document. This article was later amended, but not in any respect material to the case before us, and it in part now reads:

"Section 121. Every male person of the age of twenty-one years

or upwards, belonging to either of the following classes, who shall have resided in the state one year, in the county six months, and in the precinct ninety days next preceding any election, shall be . . . a qualified elector at such election:

"First. Citizen of the United States. . . ."

That the intention was to thereby limit the exercise of the elective franchise to those citizens of the United States who had lived in the precinct, and in the county, and in the state, the periods respectively designated cannot be questioned. Would it be contended by anyone that that provision authorizes a resident of the state of Minnesota to vote at an election in this state? Can it, with any greater certainty, be maintained that it permits or authorizes a resident of Benson county to vote at any election in Ramsey county? And, if not, it seems clear to me that the provision is no more liberal with reference to citizens of the United States residing in the fourth precinct of the city of Devils Lake by authorizing or permitting them to vote in the first precinct. The same language applies to the precinct that applies to the county and the state. An American citizen over the age of twenty-one years may be a resident of the state for more than a year and yet not entitled to vote,—that is, not be an elector,—because he has not lived in the county six months. He may have resided in the state a year and in the county more than six months, but not have resided in the precinct ninety days, and still he is not an elector. He fails to possess the constitutional qualifications or requirements necessary to entitle him to vote. The use of the word "the" in each instance is identical. It does not say *a state, a county, a precinct;* neither does it say *any state, any county,* or *any precinct;* but in each instance it says *the,* and a brief application of thought to the subject about which that section of the Constitution treats seems to me to render clear what is meant. It is dealing with the qualifications of the elector. Those qualifications consist in citizenship and residence. In addition to a citizenship, there must be three kinds of residence; and failing in either one of these qualifications as to residence, he is not an elector at the election at which he seeks to vote; and if he is not an elector, neither the fiat of a city council nor of a city auditor, in disobedience of law, can make him one; and while a court has the power to hold valid a vote cast by one not an elector, and sustain an election at which

presumably two thirds of the votes cast were illegally cast, yet it seems to me that, in a matter of this importance and one which it is so easy and simple to remedy by calling a legal election, any court should hesitate long before establishing a precedent of the kind established in this case. And so far as the facts ought to influence a decision, the mere fact that this election was so close that a change of four votes from the majority to the minority, or an addition of six votes to the minority, would have changed the result, calls for great care in reaching any decision that may be reached. It may be conceded that the authorities are somewhat in conflict on the subject, yet an analysis of some of them will disclose that the conflict is not as serious as might be at first thought.

The Constitution left it to the legislative assembly to define the precinct. As is shown in the majority opinion, it has done so, and each ward in a city constitutes a precinct since 1911, at all city elections. For this reason the constitutional mandate is as express and definite as though § 121 of the Constitution had in itself fixed the boundaries of every precinct in the state.

My second proposition is that, regardless of the constitutional provision, the election was held in violation of statute. The legislative assembly has provided a quite comprehensive Code for the registration of electors, the conduct of elections, and all proceedings connected therewith. Section 605, Rev. Codes 1905, is a re-enactment of the constitutional provisions as to who is entitled to vote. Section 732 designates who shall constitue the board of registry for the respective precincts, and provides for their making a list of all persons qualified to vote at the ensuing election, in such election precinct, and that such list, when complete, shall be known as the register of electors of such precinct. Section 732 requires such register to contain a list of the qualified electors of such precinct, alphabetically arranged, and that it show the residence, etc., or other location of the dwelling place of each elector, and provides regulations for the government of the board in placing names upon the register; but it nowhere provides for the insertion therein of the name of any person not a resident of the precinct for which the register is made and in which it is to be used. On the other hand, it provides for the entry thereon of the names of persons ascertained by such board, or known by them, to be qualified electors in such precinct, or

proof, to be made by the oath of the person applying to be registered, or of some other elector whose name is already on the list, and requires *the omission from such register of the names of all who have died or removed from the precinct since the last poll list was made.* It then requires that the board shall certify to copies of such register as a true list of the voters in its precinct, so far as known, and for the posting of the list in a conspicuous place where it may be accessible to any elector desiring to examine it or to make copies. Section 734 provides for the registry list in new precincts, and its provisions are in harmony with those relating to old precincts, and it comprehends the inclusion in the registry list of the new precinct of the names of persons who are known by the board to be electors in their precinct, or proved to be such by the oath of an elector whose name has already been entered upon the register, or by the oath of the applicant. To guard against fraud, § 736 provides that the proceedings of the board of registration shall be open, and that all persons entitled to vote in such precinct shall be heard in relation to corrections or additions.

Section 737 is important. It provides that it shall be the duty of such board at one of its meetings *to erase from the registry list the name of any person inserted therein who shall be proved by the oath of two legal voters of such precinct to the satisfaction of such board to be a nonresident of such precinct.* Section 738, as amended in 1911, provides for the use of the lists thus made on the day of election by the election board, and that no vote shall be received at any election in this state if the name of the person offering such vote is not on the registry list, unless such person shall furnish to the judges of election his affidavit, stating therein that he is *a resident of such precinct,* giving his place of residence, and the length of time he has resided there, corroborated by the oath of a householder and registered voter of the precinct. *To register he must prove that he is, or be known to the officials to be, a resident of the precinct in which he seeks to register; to vote he must be in the register or prove that he is such a resident.*

Section 744 makes it a felony for any person to cause his name to be registered, knowing *that he is not a qualified voter in the precinct where such registration is made,* or for any person to aid or abet another in any of the acts prohibited. Section 8600 of the Penal Code also makes it punishable by imprisonment in the penitentiary for any person to

cause his name to be registered as that of an elector upon any register, . . . knowing that he is *not a qualified voter within the territorial limits covered by such register.* Section 8597 makes it a misdemeanor for any person to knowingly vote or offer to vote in any *election precinct or district in which he does not reside* or in which he is not authorized by law to vote. To the alternative part of this section, I will refer later. Section 8594 provides a penalty for voting or offering to vote by one knowing himself not to be a qualified voter. Section 8628 makes it a misdemeanor for any person to vote upon any question or issue pending or submitted to any caucus or primary meeting, if the person is not a *qualified elector of the ward or election precinct* in which such caucus or primary meeting is held.

The different sessions of the legislature which have enacted and amended primary election laws have made many of the sections above cited apply to the conduct of primaries. Section 2744, Rev. Codes 1905, as amended by chapter 66, Laws of 1911, provides that every legal voter of the county in which a city is situated, who shall have been a resident of the city ninety days next preceding a city election, shall be entitled to vote at all city elections, and requires the city council to provide for the registration of all voters in all cities of more than 400 voters as determined by the last annual election, and permits it to provide for the registration of all voters in accordance with the laws of this state at one polling place, but in such case requires separate registration lists to be provided and kept for each ward, and contains an express prohibition on *any person voting in any other place than the ward or precinct where he resides, except where otherwise provided by law.* This exception, like the one to which I have above referred to, contained in the Penal Code, has no application in the instant case, even if a valid exception, and there is no pretense that the law authorized the election to be held in the manner complained of.

In 1911, by chapter 65 of the Session Laws, § 2743 of the Revised Codes was amended so as to provide that in all cities where aldermen are not elected at large each ward shall constitute an election district, and for the division of large wards into two or more precincts for voting purposes, the consolidation of two or more small wards into one voting precinct; and it permits the council, if it so elects, in any city of less than 400 voters, as determined by the last annual election, by ordinance

to consolidate all the wards into one precinct for voting purposes, but requires, in case of such consolidation, that in city elections separate ballot boxes and poll books shall be provided and kept for each ward. It also provides that such wards and precincts shall constitute election districts for all state, county, and school elections. This law was in force when the election in question was held at the city of Devils Lake, in which there were more than 400 qualified voters. Here is an express mandate on the subject; and, in my opinion, if all the provisions to which I have made reference were eliminated except the one contained in the Constitution, and §§ 2743 and 2744, as amended in 1911, should determine this case. This election was held in direct violation, not only of the letter of the statute and of the Constitution, but in violation of the spirit and intent of all the provisions on the subject. A mere argument based on the question of convenience or the trifling expense of holding another election appears to me to be entitled to no consideration whatever. If there was no authority in law for holding such an election, it would be invalid or the law meaningless. If valid, any group of people may call an election at any time and at any place, and impose a burden upon the inhabitants of any municipality, which neither in law nor morals have they any right to impose.

It will be seen by the above citations that the legislative construction during the entire period of statehood has been to the effect that no one could vote in a precinct unless he was a resident of that precinct and had been for ninety days next preceding the election. But it is held in the majority opinion, and on this I express no opinion, that registration was unnecessary at this special election, and it may, therefore, be thought that the provisions regarding registration have no bearing upon the subject under consideration, but I think they have a marked bearing. The registration law is at least applicable to what may be called general city elections, and we are not justified in assuming that the qualifications for voters at a special city election differ from those at a general or annual city election, or one where a mayor is elected. Such an assumption would clearly be absurd.

It is held in the majority opinion that this election was merely an irregular election, and not an invalid one, because the statute does not say in express language that a violation of the constitutional provision, or a violation of the statute in regard to the place of voting, shall invalidate

the election or the votes so cast. Apply this reason to mortgage foreclosure judgments and many statutory proceedings, and how would the decisions harmonize with the one in this case? I am aware of no provision saying that most such proceedings are void for failure to comply with the statute, yet courts have never hesitated to hold them so, or at least voidable. When we take into consideration all the sections and provisions to which I have made reference, or from which I have quoted, and the express prohibitions contained in many of them, it seems to me that they are entitled to some weight, and that if it is illegal for a person to vote in a precinct of which he is not a resident, an election held in the first ward of Devils Lake, in which those qualified to vote in each of the other three wards commingled their votes with those of the first ward, is invalid, unless we can fall back on to the proposition that we do not know that the result was changed. As to this it must be remembered that the complaint in this case gives the names of twenty-one people who voted, who, it is charged, were not entitled to vote anywhere in the city. It is true that there is no allegation that they voted for the issuance of the bonds, but this is a specific charge of fraud, not necessarily on the part of the officials, but in the election, and ought to be adequate to impeach the whole election where the result is so close as I have shown it to be in this case, unless the party claiming such votes shows them legal. Neither do I think that the law applied in so many cases, requiring an allegation under oath that the votes fraudulently cast changed the result, should be adhered to in this case. When we became a state and adopted our Constitution, in addition to provisions inserted in the Constitution, there was an overwhelming public sentiment in favor of providing, either in the Constitution or by statute, for the Australian ballot, and that a secret ballot should be required. The constitutional convention, in its effort to avoid excessive legislation in the Constitution, and recognizing as a fact that the demand for the secret ballot would result in the immediate action by the legislature, omitted to make provision for it in the Constitution, but did provide for a secret ballot and for the regulation of elections. Constitution, § 129. The legislative assembly, recognizing the sentiment to which I have referred, provided for the Australian ballot. The object of this ballot is to promote the purity of elections, and to protect the elective franchise from adventurers and people seeking to promote their own selfish and unpatriotic aims. In

this respect our election system differs materially from those of several of the other states, authorities from which have been cited in the majority opinion. In some of those states each ballot is required to be numbered to enable the proper officials, in case of a contest, to identify the person who cast it; but here all provisions look to the contrary, and the contestant is handicapped when an election is very close. He does not know how the twenty-one unqualified voters voted. He has no power to ascertain. In fact it may be doubted if he has any right to ascertain, at least until the case gets into court for trial. Presumably he cannot ascertain how the twenty-one voted. They may have been transients and have departed the day after the election, and it seems to me in such a case to require him to plead something that he has no information on, and perhaps verify it by his oath, is too exacting, particularly in a case where so few votes would change the result.

Now I will review a few of the authorities cited by my brethren. Much weight seems to be placed upon People ex rel. Lardner v. Carson, 155 N. Y. 491, 50 N. E. 292. Without undertaking to pass judgment as between the opinion representing the majority, namely, Judges O'Brien, Bartlett, Haight, and Martin, and the three in minority, namely, Chief Justice Parker, Judges Gray, and Vann, I may say that the case is not necessarily an authority. The Constitution of New York, as far as material, was as follows:

"Every male citizen of the age of twenty-one years, who shall have been a citizen for ten days, and an inhabitant of this state one year next preceding an election, and the last four months a resident of the county, and for the last thirty days a resident of the election district in which he may offer his vote, shall be entitled to vote at such election in the election district of which he shall at the time be a resident, and not elsewhere, for all officers that now are or hereafter may be elective by the people." [N. Y. Const. art. 2, § 1.]

When the city of Lockport was chartered by legislature of New York, the charter provided that the polling places for the town of Lockport should be outside the boundary lines of the town and within the limits of the city of Lockport. At a general election the vote of the town of Lockport was cast at polling places located within the borders of the city, and if the votes cast at those polling places were not received it changed the result of the election as to the superintendent of the poor

of Niagara county. A majority of the court held that the constitutional provision meant that the elector must vote at the polling place designated by law for casting the vote of the district where he resides, and that the validity of his vote is not affected by the circumstance that the polling place is by law located outside the boundary line of the district; that in such case he votes within the district of his residence within the purview of the Constitution. But in that case the polling places and the ballots, the officers and the voters, were all as separate and distinct from those of the city of Lockport as though the polling places had been within the town of Lockport. This fact clearly distinguishes it from the case at bar, and I think the doctrine of the decision might be read to be that the polling place, although located outside the boundaries of the precinct or district, becomes, for the purpose of the election, a part of the district or precinct for which it is alone used. Also in that case all fraud was expressly disclaimed in the conduct of the election, and also the casting of illegal votes. The strong dissenting opinion of Judge Vann construes and he indicates the decision to be to the effect that under the law the town election districts were projected into the city so as to embrace the polling places designated therein for the town. He says:

"No one would think of so construing the Constitution as to make it mean that a person could, for any purpose, be a resident of both city and town on the same election day, were it not for the temporary inconvenience of holding otherwise. Convenience has nothing to do with the meaning of the Constitution, which does not change in order to accommodate a community. Its broad and general rules are made for the government of the entire state, and they do not vary because a few hundred people want them to. The Constitution is not a leaden rule that bends up and down, so as to measure 12 inches when the surface is smooth and 11 when it is rough, but it is constant, uniform, and inflexible, and all must obey its commands, whether convenient or inconvenient. . . . Its words should be given their usual meaning unless the context shows a different intention, of which there is no evidence in the case in hand. . . . A strained construction of the Constitution, made to meet an emergency, is an injury to jurisprudence, for it disturbs the foundations of the law and trifles with the confidence that is reposed in the judgments of courts."

In that case the question was the constitutionality of the provision

referred to in the legislative charter of the city of Lockport, and Judge Vann truly observes: "It is better that a small proportion of the inhabitants of the state should suffer temporary inconvenience than to permit the will of the mass of the people, as expressed in the adoption of the Constitution, to be defeated by a loose construction that may invite abuses and permit disorder." In the case at bar we are not concerned with the constitutionality of any statute, but with the validity of the acts of city officials, and are required to determine whether the conceded illegality of those acts renders their result invalid.

Much reliance is also placed upon decisions from Missouri and Texas. Bowers v. Smith, 111 Mo. 45, 16 L.R.A. 754, 33 Am. St. Rep. 491, 20 S. W. 101, when the facts are considered, seems to me to have no application. In that case the election officials arranged two polling places in the precinct, in the same building, and on the same alley or portico, but about 75 feet apart, with two sets of officials. The polling places were in sight of each other. The purpose was to save confusion and expedite the conduct of the election. The large number of voters made it inconvenient to serve all in one place, and it was held that this division of the polls did not invalidate the election as to that precinct.

State ex rel. Brown v. Westport, 116 Mo. 582, 22 S. W. 888, is a case in which there were four wards in the city and an election to determine incorporation as a city was held, and the vote was all cast in one place, notwithstanding the fact that each ward was a separate election district under the law. There was no claim or pretense of fraud or unfairness, and the city had acted, for twelve years after the election, on the assumption that it was legally incorporated, and it had during all that time exercised all the prerogatives of a city, and been recognized by the public and by judicial tribunals as a city. It was held after all these things had occurred that the state may, by long acquiescence and continued recognition of a municipal corporation, through her officers, state and county, be precluded from an information to deprive it of franchise long exercised in accordance with the general law.

As to the election being irregular, a question which need not have been decided, the court simply cited Davis v. State, 75 Tex. 424, 12 S. W. 957, and one or two other authorities following that case. The Westport Case was followed in State ex rel. Canton v. Allen, 178 Mo. 555, 77 S. W. 868, but as to these decisions and all other Missouri decisions

on the subject it may be said the Constitution then in force only required a residence in the city, without reference to precinct or district. In Davis v. State, 75 Tex. 424, we have the authority on which the Missouri cases were predicated as to the election being merely irregular. In that we find a divided court, as is shown by the report of the case in 12 S. W. 957, and in 84 Tex. at page 191. But I cannot read the Davis Case as being of necessity an authority in this case. In that case the election was held in the same manner as in the case at bar, but it appears that, although the statute provided that in each incorporated city, town, or village each ward should constitute an election precinct, the voting places were fixed by a commissioners' court, and the supreme court says: "But as we construe the statute in relation to this matter, it was the intention of the legislature to impose the duty upon the commissioners' courts, of fixing the place in each county where the votes should be cast. . . . In order to comply with these requirements it is necessary for the courts to determine as a preliminary inquiry, in the first place, whether or not there is an incorporated town, village, or city in their county; and, in the second, whether or not it is divided into wards. This is a necessary incident of the duty imposed and the power conferred upon them. Having, then, the jurisdiction to determine the questions, was it intended that their decision should be subject to attack in a collateral proceeding?"

And the court proceeds to hold that, in a collateral proceeding like the one there involved, the decision of the commissioners' court had the effect of a judgment, and inasmuch as it had jurisdiction to decide whether the city was incorporated, and divided into wards, its decision was conclusive. And it held that the failure of the commissioners' court to make each ward an election precinct did not avoid the election unless it was shown that the court had acted with a fraudulent purpose. The foundation of the decision, as I read it, is that the judgment could not be attacked collaterally for an erroneous decision in a matter within the jurisdiction. I suggest the reading of the dissenting opinion of Judge Henry, published in 84 Tex. 191.

The case cited from 68 N. J. Law is like the New York case, and only applies to a polling place located independently of all others but outside the district, and in the quotation contained in the majority opinion it is significant that the New Jersey court says:

"That does not raise the question of one voter lawfully entitled to vote in his district voting at the ballot box of another district."

Peard v. State, 34 Neb. 372, 51 N. W. 828, presents facts similar to those in State ex rel. Byrne v. Wilcox, 11 N. D. 329, 91 N. W. 955, but the Nebraska court places the burden of proof on respondent, and holds that, in the absence of proof that the votes in question were cast by qualified voters of the district, such votes are presumptively void. I do not care to analyze more authorities cited from other jurisdictions. These are sufficiently illustrative of all.

Let us now consider some which appear to me to sustain my views. We first have the case of Territory ex rel. Higgins v. Steele, 4 Dak. 78, 23 N. W. 91, which in all respects is identical with the case at bar, except that a special county election was involved, instead of a city election. The county of Kidder was divided into three precincts. The polling places were Tappan, Dawson, and Steele, Steele being the county seat. Steele and Tappan were between 13 and 14 miles apart, with Dawson about midway between the two. A bond election was called by the commissioners, and the polling place fixed at Steele for the three precincts. The court held the election invalid. Most eminent counsel were employed on both sides, and the report of the case indicates that every authority available to sustain the election was presented. The court remarks: "In every case that has fallen under our notice it is held that when the failure to comply with such conditions and requirements tends to mislead and obstruct a full and fair exercise of the right of the elective franchise, such conditions and requirements cannot be disregarded with impunity." It finds that the conditions imposed tended to mislead and obstruct the full and fair exercise of the right of the elective franchise, and says:

"The claim that is made that these people might have voted at Steele is simply ridiculous in view of the fact that § 68, Penal Code, provides that every person who votes or offers to vote in any election district in which he does not reside is guilty of a misdemeanor." Section 68 of the Penal Code has been brought forward into our Code, and is one of the sections which I have cited.

Bean v. Barton County Ct. 33 Mo. App. 635, is directly in point. It is on all fours with the case at bar, and the election was held invalid and set aside, reversing the lower court. This case, however, was not de-

cided by the supreme court of Missouri, and no reference is made to it in the decisions of that body; whether because it was not deemed in point I cannot say. It certainly is not expressly overruled. The Constitution of Illinois is identical in effect with our own on this subject. As far as necessary to quote it reads: "Every person residing in this state one year, in the county ninety days, and in the election district thirty days next preceding any election therein, . . . above the age of twenty-one years, shall be entitled to vote at such election."

In People ex rel. Delaney v. Markiowicz, 225 Ill. 563, 80 N. E. 256, it is held that in state, county, city, and village elections the voter, in addition to all other legal qualifications, must have resided thirty days next preceding the election in the election district in which he votes.

People ex rel. Ringe v. Gochenour, 54 Ill. 123, holds that the clerk could not give legal notice of an election until the city council had acted for the purpose of determining where the election should be held. This case is directly in point on the fact that the city council of Devils Lake did not designate, in their resolution calling this special election, the polling places. The only designation made was made by the clerk. It may be argued that this is not specifically alleged as a ground for reversal, but I think the points made in the brief of appellant are broad enough to cover it, although it is not specifically argued. This fact appears clearly upon the record presented. I do not wish to be understood as resting my conclusions upon it. They are based upon more vital and important questions, but this alone should invalidate the election.

In Stephens v. People, 89 Ill. 337, it is held that it is essential to the validity of an election that it be held at the time and in the place provided by law; and that when the time and place are not fixed by law, and the election is only to be called, and the time and place fixed by some authority named in the statute, after the happening of some condition precedent, it is essential to the validity of such an election that it be called and the time and place fixed by the very agency designated by law, and none other.

In Williams v. Potter, 114 Ill. 628, 3 N. E. 729, we have a case where two voting places in the same town, which contained one precinct, were designated by the county board and the town clerk, in giving notice of the annual town election, named a schoolhouse in a certain district as the voting place for a part of the town; and it was held that in-

asmuch as that schoolhouse had not been designated by the county board as a polling place, the votes there cast were cast at a place unauthorized by law, and could not be counted.

Behrensmeyer v. Kreitz, 135 Ill. 591, 26 N. E. 704, is considerably in point, but the facts are too complicated to be here stated.

In People ex rel. Atty. Gen. v. Holihan, 29 Mich. 116, it is held that electors are only allowed to vote in their proper districts; that they cannot be residents of one district and at the same time be allowed to vote in some other. See also Snowball v. People, 147 Ill. 260, 35 N. E. 538. In Darragh v. Bird, 3 Or. 229, it is held that an elector may only vote for county officers in the precinct where he resides, and I commend the reasoning and the observations of the court in that opinion to the consideration of readers. In State ex rel. Bancroft v. Stumpf. 23 Wis. 630, two votes were thrown out because they were cast by persons not residing in the town in which they were cast, and the court holds that electors must vote in the town, ward, or election precinct where they reside. State ex rel. Wannemaker v. Alder, 87 Wis. 554, 58 N. W. 1045, is a case directly in point. It was an action in the nature of quo warranto to test the title to the office of county clerk. He claimed to have been elected at the general election in 1892. It appears that the voters of one precinct, to the number of forty-nine at least, voted in another precinct, although in the same county, and had they voted in their own precinct they would have been entitled to vote for a candidate for county clerk; and the court held that they were not lawful voters in the precinct in which they voted, and threw out their votes. The Constitution of Wisconsin provided that no elector should vote except in the town, ward, village, or election district in which he actually resided. The court said that the question presented was strictly one of law; that the constitutional provisions could not be compromised by any considerations of policy and convenience. In the precinct in which these voters resided no place had been provided for holding the election; and the court says on that subject that they cannot correct their own fault and neglect by being allowed to vote at the town poll at which the law gives them no right to vote. If the law has established a precinct in which only the electors can vote, then it is their duty to hold an election there, and they omit such a duty under the penalty of losing their right to vote anywhere. As to the argument,

which is likewise suggested in the case at bar, that this was a *de facto* election and the officers of the precinct where the illegal votes were cast were *de facto* officers, the court says it has no force, and that there is no argument strong enough to destroy the force of law when expressed in such clear and unequivocal language, and the violation of such a law cannot be palliated or excused. But it is argued in reference to the Constitutions of New York, Wisconsin, and some of the other states, which contain the expression, "where he offers to vote," or its equivalent, that that differentiates those cases, and makes it clearer that they may not vote outside of the precinct in which they reside, than does the language of our own Constitution and laws. I cannot assent to this doctrine. As I show in the fore part of this opinion, the Constitution and the statute read, *the state, the county,* and *the precinct.* These expressions can refer to no state, county, or precinct except this state, the county, and the precinct in which the voter resides and offers his vote, and it must mean that he must offer his vote, and that it is to be received and counted only in the precinct in which he resides.

Chase v. Miller, 41 Pa. 403, construes the Constitution of Pennsylvania, which is: "In elections by the citizens every white freeman of the age of twenty-one years, having resided in the state one year, and in the election district where he offers to vote ten days immediately preceding such election . . . shall enjoy the rights of an elector." I contend that the meaning of this provision is identical with that of our own, barring the difference in periods of residence. The court says that this provision means that the voter *in propria persona* shall offer his vote in an appropriate election district in order that his neighbors may be at hand to establish his right to vote, if challenged, or to challenge, if doubtful, and that when so understood the provision introduced not only a new test of the right of suffrage, to wit, a district residence, but a rule of voting also; that place became an element of suffrage for a two-fold purpose, and that without the district residence no man could vote, but having such residence the right it confers is to vote in that district; and that the court has no power to dispense with either the test or the rule; that the residence for ten days within the district is a part of the condition of suffrage, and putting the meaning of the constitutional provisions in its own language the court says: It

"may . . . be stated thus: Every white freeman, twenty-one years of age, having 'resided,' according to the primary meaning of that word, or according to legislative definition of it, in any 'election district' created by or under the authority of the legislature, for ten days preceding the election, shall be permitted to offer his ballot in that district."

The court also says: "Our Constitution and laws treat the elective franchise as a sacred trust committed only to that portion of the citizens who come up to the prescribed standards of qualification, and to be exercised by them at the time and place, and in the manner, prearranged by public law and proclamations, and whilst being exercised to be guarded down to the instant of its final consummation by magistrates and constables, and by oaths and penalties."

And that a law permitting electors to vote outside their precincts creates the occasion and furnishes the opportunity for abominable practices. In referring to the question of disfranchisement, which appealed in that case to the trial court very strongly, it says: "Four of the judges of this court, living in other parts of the state, find themselves, on the day of every presidential election, in the city of Pittsburgh, where their official duties take them and where they are not permitted to vote. Have they a right to charge the Constitution with disfranchising them? Is not the truth rather this,—that they have voluntarily assumed duties that are inconsistent with the right of suffrage for the time being?"

And the court, in concluding its long opinion, makes these pertinent observations: "Finally, let it be said that we do not look upon the construction we have given the constitutional amendment as stringent, harsh, or technical. On the contrary we consider it the natural and obvious reading of the instrument, such as the million would instinctively adopt. Constitutions, above all other documents, are to be read as they are written. Judicial glosses and refinements are misplaced when laid upon them. . . . But when asked to set up a construction that opposes itself to both the letter and the spirit of the instrument, and which tends to the destruction of one of our fundamental political rights—that free and honest suffrage on which all our institutions are built—this court must say, in fidelity to the oaths we swore, that it cannot be done."

In direct line with this authority is Re McNeill, 111 Pa. 235, 2 Atl. 341.

It seems as though these decisions are enough to indicate that the place of holding elections is of the substance, and that a material variation from the place, and particularly when the change deprives electors of a precinct of their rightful officers, and compels them to commingle their ballots in the same box with those of several other precincts, is of the substance; that the statutory provisions are mandatory, and not simply directory, and that it is something more than an irregularity. Time and place have almost universally been held to be of the substance in an election. See Johnstone v. Robertson, 8 Ariz. 361, 76 Pac. 465; Heyfron v. Mahoney, 9 Mont. 497, 18 Am. St. Rep. 759, 24 Pac. 93; Melvin's Case, 68 Pa. 338; Russell v. McDowell, 83 Cal. 70, 23 Pac. 183; Satterlee v. San Francisco, 23 Cal. 315; Stephens v. People, 89 Ill. 337; Payne, Elections, § 327; McCrary, Elections, §§ 153, 158, 161, 176 and 228.

After considering all these authorities, it may be well to revert to decisions of our own court. Two cases have recently been decided which appear to me to be decisive and to uphold the conclusion that this election was invalid. It was held in Elvick v. Groves, 17 N. D. 561, 118 N. W. 228, and in State ex rel. Johnson v. Ely, 23 N. D. 619, 137 N. W. 834, that the change of a polling place by the voters invalidated the votes cast in the precinct in which the voting place was so changed. In the majority opinion an attempt is made to distinguish these authorities, and to show that the principles there announced are not applicable in the case at bar. I am unable to distinguish them. If the people who themselves are doing the voting may not ordinarily change the polling place to another place within the same precinct, because not authorized by law so to do, I cannot see how the city auditor or the city council may change the polling place of several precincts to one outside the respective precincts. They are not authorized to make such a change, and the principle involved does not relate to the individual who makes the change, but in both cases is that the change is made without authority of law, and this is what renders the votes so cast invalid and void. But it is said that the whole question is settled in State ex rel. Byrne v. Wilcox, 11 N. D. 329, 91 N. W. 955. It ought to be sufficient to call attention to the

fact that in that case the court granted the motion to quash the writ because, as found, it did not have original jurisdiction. This rendered all that it said on the merits *obiter*. In that case there was a conflict between the precincts established by the city council and those by the county commissioners within the limits of the city of Bismarck. If the wards were the precincts, it threw parts of some wards into each of different county commissioners' districts, and the commissioners districted the city in harmony with the commissioners' districts. It will thus be seen that a very practical proposition was presented, and that this impressed the court very strongly, as appears by a perusal of page 339. But, as I read the decision, it does not appear that any person desiring to vote at that election was, by the act of the commissioners, required to vote outside the ward in which he resided. The decision on the question of the irregularity or invalidity of the election was all made to hinge on the fact that it was an original application made to this court, and it expressly states that the merits of the action would be for the determination of the district court. The question of the validity of this election is the important question in this case. It is important to the residents of Devils Lake, but of far greater importance to the people of the state and to the courts for future guidance. No question of disfranchisement is involved, as might be in case of a general election, because, as I have indicated, the question will still be open for a proper submission to the electors of the city. Custom is not an element. It is alleged that all special elections in the city have been held at one place only; but there is no allegation or proof of the number or dates of such elections, and as far as we know they may have been held when only one polling place was required by statute.

It may be that the election should have been called by ordinance, rather than resolution; but, as this is of minor importance, I will express no opinion thereon, nor upon other questions involved.

There is one theory on which the judgment of the district court might possibly be affirmed. The record contains enough to indicate that the plaintiff is seeking to vindicate a personal property right, rather than a right incident to citizenship; that the action is in fact brought to prevent the city of Devils Lake furnishing its own lights, to the detriment of the existing private plant operating in that city. Assuming this to be so, was it not the duty of the plaintiff to have proceeded,

on discovering the illegality of the election proposed, to prevent the holding of the election or to seek the correction of the procedure? Should the plaintiff be allowed to stand by and take the chances of a favorable result, and then, after having done so, the result being unfavorable, be permitted to set it aside? It must be borne in mind that this is not an action in the name of the state on the relation of a citizen, but is an action by an individual, one apparently seeking to vindicate a private property right only. I cannot resist the conclusion that the announcement of the law by the majority of the court in this case is erroneous.

FIRST NATIONAL BANK OF WESTHOPE, a Corporation, v. J. M. MESSNER, et al.

(141 N. W. 999.)

National banks — loans — real estate — security — voidable — sovereign — ultra vires — debtor — no defense.

1. A loan made by a national bank upon real estate security, although prohibited by § 5137, U. S. Rev. Stat. ed. 1878, U. S. Comp. Stat. 1901, p. 3460, is voidable, and not void, and the sovereign alone can be heard to object. Its *ultra vires* nature cannot be pleaded as a defense by the debtor.

Agent to collect — release — notes — securities — face value — liability — action — damages — principal — original debtor.

2. Where an agent to collect, in violation of his duty, releases notes and securities for less than their face value, he can be held liable in an action for damages brought by his principal, even though such principal has not first sought to collect the sum so remitted from the original debtor, or to set aside the release and reassert his lien in a court of equity upon the securities. The principal is not required to undo, or to seek to undo, that which his agent has voluntarily done.

Suit — principal — agent — unauthorized act — damages — ratification — pleading — defense.

3. In a suit by a principal against an agent for damages arising out of an unauthorized act, the complaint is not required to negative a ratification by such principal. The ratification, if any, would be a matter of defense.

Complaints — construed liberally — interpretation.

4. Under the Code of Civil Procedure, complaints are liberally, and not strictly, construed, and the old rule that pleadings are to be interpreted strictly against the pleader no longer obtains.

Opinion filed April 28, 1913.

Appeal from the District Court for Bottineau County, *Burr*, J.

Action to recover damages caused by the alleged unauthorized act of plaintiff's agents, defendants in this action.

From an order overruling defendant's demurrer to the complaint, defendants appeal.

Affirmed.

This is an appeal from an order overruling a demurrer to a complaint. The complaint, among other things, alleges that the plaintiff bank loaned money to the Westhope Land & Loan Company, which said loans were secured by real estate securities; that at the times mentioned, the defendant J. M. Messner was the cashier of the plaintiff bank, and also the secretary and a stockholder of the Westhope Land & Loan Company; and that the defendant Hilleboe was vice president of the said bank, and president and a stockholder in the land company; that for a long time prior to the suit they had ceased to be such officers of said bank, but continued to be officers and stockholders of the land company; that "all of said loans were thereafter repaid by the said Westhope Land & Loan Company to this plaintiff, without interest; and that these two defendants, without right or authority, and with full knowledge of all the terms of the agreements hereinbefore set forth, and in violation of their duties as cashier and vice president, respectively, of this plaintiff, and with the wrongful intention of defrauding this plaintiff, and with wrongful intention of perverting the funds of this plaintiff to their own use, did wrongfully and unlawfully jointly conspire to and did convey and release to the said Westhope Land & Loan Company the real estate securities held by this plaintiff to secure the payment of said loans, together with interest thereon, and failed and neglected to collect the stipulated interest on the said loans, all to the plaintiff's damage in the sum of $2,957.28, no part of which has been paid, though payment thereof has been demanded; that the said West-

hope Land & Loan Company has neglected and refused to pay said interest or any part thereof, and is, and for a long time prior hereto has been, insolvent, and without any property out of which any judgment against the said company can be collected either upon execution or otherwise, and has no property subject to levy under any process whatsoever."

The demurrer raised the objection that the complaint did not state facts sufficient to constitute a cause of action, and specified that the same did not charge "that the defendants were directors in the plaintiff bank or had any part in the making of the forbidden contract to loan the Westhope Land & Loan Company money on real estate security (which, it was maintained, the Federal statute forbade), or had anything to do with the making of the loan, or that the same was done with their knowledge, consent, or participation. It asserted (2) "that said loans were afterwards repaid by said Westhope Land & Loan company to the plaintiff without interest, and that the complaint fails to allege that the payment did not extinguish the obligation of the land company, or that the interest on the loans remained still due and unpaid;" (3) that the complaint failed to allege that the release was made with knowledge of the existence of any indebtedness, or with knowledge of the fact that the debt secured was not fully paid; (4) that the complaint "alleged that this release by the defendants was without right or authority, which, if true, would not extinguish the lien as between the plaintiff and the land company, and that it failed to allege that the unauthorized release was not afterwards ratified by the bank, or that any facts existed or still exist which would prevent the bank from subjecting the security to the payment of the debt;" (5) that the complaint "said that any indebtedness from the land company to the bank, if it existed, was still in force after the alleged release, and failed to allege that the land company was not solvent at the time the release was made, and failed to show why the bank did not collect the balance of the said indebtedness, if any;" (6) that the complaint "failed to show that the property cannot now be subjected to the payment of the debt;" it also asserted, (7) that while the complaint alleged that the agreement or conveyance was made prior to June 5, 1905, it did not allege when the conveyances to the bank were made, and failed to allege when the real estate was released by these defendants, and failed to show

that the release was within five years of the date of the conveyance to the bank, or within the time that the bank could hold either possession or title for the purpose of security under § 5137 of the United States Banking Laws of 1878."

Noble, Blood & Adamson, for appellants.

A conveyance or mortgage of real estate to a national bank as security, except for a prior indebtedness, is prohibited by law. U. S. Rev. Stat. ed. 1878, § 5137, U. S. Comp. Stat. 1901, p. 3460.

Soule & Cooper and *Bangs, Cooley, & Hamilton,* for respondent.

The United States alone has the right to complain of any infraction of the National Banking Laws. 2 Morse, Banks & Bkg. 4th ed. p. 1187, § 750. As against a demurrer, a pleading will be deemed to allege whatever can be implied by fair and reasonable intendment. Sommer v. Carbon Hill Coal Co. 32 C. C. A. 156, 59 U. S. App. 519, 89 Fed. 54; Roberts v. Samson, 50 Neb. 745, 70 N. W. 384; Wenk v. New York, 171 N. Y. 607, 64 N. E. 509; Emerson v. Nash, 124 Wis. 369, 70 L.R.A. 526, 109 Am. St. Rep. 944, 102 N. W. 921.

Bruce, J. (after stating the facts as above). It is unnecessary for us to consider the question of the authority of the bank to make real estate loans. Banks are more and more coming to be looked upon as quasi public institutions, and their solvency to be regarded as a matter of public interest. Actions which are brought by them to collect their loans and to realize upon their assets are, for this reason, looked upon as actions which are brought not merely for the benefit of the stockholders, but of the depositors, also. Such being the case, even though the officers of a national bank may make an *ultra vires* contract, and may make a loan upon real estate security which is prohibited by § 5137, U. S. Rev. Stat. ed. 1878, U. S. Comp. Stat. 1901, p. 3460, the courts have held that the sovereign can, alone, interfere, and that the debtor will not be allowed to assert the invalidity of the mortgage or of the transaction. These rulings and considerations must, also, in logic apply where an officer or agent of the bank releases a debt for less than its face value, and is sought to be held liable therefor. He is not sued by the directors or officers of the bank, but by the bank itself, which, to all intents and purposes, is a trustee, as it were, for

the depositors as well as for its stockholders. The *ultra vires* nature of the security, therefore, and of the transaction, can no more be pleaded by him than it can be by the original debtor. Such loans are voidable and not void, and the sovereign alone can be heard to object. 2 Morse, Banks & Bkg. 4th ed. p. 1187, § 750; Warner v. Dewitt County Nat. Bank, 4 Ill. App. 305; Union Nat. Bank v. Matthews, 98 U. S. 621, 25 L. ed. 188; Fleckner v. Bank of United States, 8 Wheat. 338, 5 L. ed. 631; Franklin Co. v. Lewiston Inst. for Savings, 68 Me. 43, 28 Am. Rep. 9; 2 Morse, Banks & Bkg. 1184.

Nor is there any merit in the contention that the complaint fails to allege why the bank, after discovering the fact of the unauthorized release, did not, by some proceeding in equity, seek to reassert the lien of the mortgage upon the real estate, or to collect the interest from the debtor. We do not understand the law to be that an agent who is sued by his principal for a violation of his duty, and for having accepted less than the face value of his principal's claim, and for having released the debt and the securities, can compel his principal to undo or seek to undo that which he, the agent, has voluntarily done. There can certainly be no question that, prima facie, the principal is damaged to the amount of the interest which has not been collected. 1 Clark & S. Agency, §§ 402-d, p. 903, 402-g, p. 905; Kempker v. Roblyer, 29 Iowa, 274; Continental Ins. Co. v. Clark, 126 Iowa, 274, 100 N. W. 524. In this view of the case, also, the allegation as to the insolvency of the land company is mere surplusage, and the objection that such insolvency is not by the language of the complaint related to the time of the release is without merit.

There is also no merit in the objection that the complaint fails to allege that the unauthorized release was not afterwards ratified by the bank. This was a matter of defense, and the ratification, if any, was not required to be negatived by the complaint. We have yet to learn that the law presumes a ratification of an unauthorized act.

Nor is there anything in the contention that the complaint does not allege that the payment did not extinguish the obligation, or that the interest on the loan still remained due and unpaid. These facts are alleged with sufficient clearness to be paid to a lawyer of ordinary understanding, and such is practically all that is required. Under our Code of Civil Procedure, complaints are liberally, and not strictly,

construed (see § 6869, Rev. Codes 1905), and the old rule that pleadings are to be interpreted strictly against the pleader no longer obtains. Manning v. School Dist. No. 6, 124 Wis. 84, 102 N. W. 356; Duryee v. Friars, 18 Wash. 55, 50 Pac. 583; Sommer v. Carbon Hill Coal Co. 32 C. C. A. 156, 59 U. S. App. 519, 89 Fed. 54; Roberts v. Samson, 50 Neb. 745, 70 N. W. 384; Wenk v. New York, 171 N. Y. 607, 64 N. E. 509; Emerson v. Nash, 124 Wis. 369, 70 L.R.A. 326, 109 Am. St. Rep. 944, 102 N. W. 921; Finch v. Park, 12 S. D. 63, 76 Am. St. Rep. 588, 80 N. W. 155; Kidder County v. Foye, 10 N. D. 424, 87 N. W. 984; Busta v. Wardall, 3 S. D. 141, 52 N. W. 418; Donovan v. St. Anthony & D. Elevator Co. 7 N. D. 513, 66 Am. St. Rep. 674, 75 N. W. 809; Rev. Codes 1905, § 6869.

The order of the District Court overruling the demurrer is sustained, and the cause is remanded to said court for further proceedings according to law.

Goss, J., being disqualified, did not participate.

GREAT WESTERN LIFE ASSURANCE COMPANY v. A. H. SHUMWAY et al.

(141 N. W. 479.)

Depositions — exceptions — evidence — accounts — books of account.

1. Sec. 7288, Rev. Codes 1905, expressly authorizes the taking of exceptions to depositions upon the grounds of incompetency and irrelevancy at the time the same is offered in evidence. It is accordingly held that defendants' objection, made for the first time during the reading of the deposition, to certain testimony as to the status of the account between plaintiff and its agent, was properly sustained; it appearing that such account was kept by plaintiff in books of account, which books were the best evidence.

Sureties — bonds — default of agent.

2. Respondents are sought to be held liable to appellant assurance company, as sureties, upon a certain bond given to indemnify it against the acts and defaults of its agent, one Shumway, the bond containing a stipulation that "the company's books shall, from time to time and at all times, be accepted

Note.—On the question what is provable by books of account, generally, see note in 52 L.R.A. 689.

and received, and shall in fact be as against the agent and sureties prima facie evidence of the amount of the indebtedness of the agent to the company, and of his accounts, dealings, and transactions with the company or on its behalf." At the trial plaintiff sought to introduce exhibits "C" and "D," the former purporting to be a mere copy of the company's ledger account with Shumway, and the latter merely a detailed statement of said account claimed to have been taken from plaintiff's books.

Held, that such testimony was incompetent and properly excluded.

Witness — deposition — conclusions.

3. The witness whose deposition was offered in evidence, testified to his mere conclusion that Shumway "is now indebted to the plaintiff company in the sum of $454.39."

Held, that such testimony was clearly incompetent and was properly stricken out on defendants' motion.

Agency contract—written admission—presumption.

4. A certain letter written by Shumway to the company shortly prior to the termination of his agency contract was offered in evidence for the purpose of proving an admission by Shumway that he was indebted to the company in a certain sum. A proper foundation was laid for the introduction of such letter, and the same was competent proof, as against these respondents, to having been written while Shumway was in the plaintiff's employ under the agency contract. Such letter is somewhat ambiguous as to the amount of the indebtedness admitted, but the same is interpreted as an admission that there was due from Shumway to the company on the date such letter was written, of the sum of $159, and it will be presumed, in the absence of any proof to the contrary, that such indebtedness continued down to the termination of the agency contract, and also at the time of the commencement of this action. Defendants having offered no evidence to rebut such presumption, it is held that the trial court should have ordered judgment for said sum, with interest.

Opinion filed May 1, 1913.

Appeal from District Court, Ramsey County; *John F. Cowan*, J.

From a judgment in defendants' favor, dismissing the action, plaintiff appeals.

Reversed with directions.

Murphy & Duggan, for appellant.

The objections to the evidence contained in the depositions were not well taken. No exceptions having been filed prior to the time of trial, only objections which went to the competency and relevancy of

the testimony could be urged. Rev. Codes, § 7288; Anderson v. First Nat. Bank, 6 N. D. 497, 72 N. W. 916; Ueland v. Dealy, 11 N. D. 529, 89 N. W. 325.

P. J. McClory, for respondent.

The witness Jordine did not qualify to enable him to testify to an account. The manner of keeping the account and the correctness of same, must be shown to be competent proof. Session Laws 1907, chap. 118.

Books of account—if in existence—are the best evidence, and a witness cannot testify to the condition of such account from memory, while such books are accessible. Greenville v. Ormand, 51 S. C. 58, 39 L.R.A. 847, 64 Am. St. Rep. 663, 28 S. E. 50; Paola Gas Co. v. Paola Glass Co. 56 Kan. 614, 54 Am. St. Rep. 598, 44 Pac. 621.

FISK, J. Action to recover on a bond executed and delivered by respondents to plaintiff, Great Western Life Assurance Company, conditioned for the payment to it of any moneys which at any time may be due and owing to plaintiff from one A. H. Shumway, appellant's agent, whom it duly appointed to solicit life insurance at Devils Lake and vicinity. The said Shumway, principal in such bond, made no appearance in the action, nor was he present at the trial. The execution and delivery of the bond sued on is expressly admitted by the answer, and practically the only evidence offered at the trial was in the form of a deposition of one Jordine, secretary of appellant company. No exceptions were filed to such deposition, but, when being read in evidence, numerous objections to the testimony were made and sustained upon the grounds of incompetency and irrelevancy. At the close of the testimony both parties moved for a directed verdict, whereupon the jury was discharged, and the trial judge took the case under advisement, and later gave judgment in defendants' favor, dismissing the action.

Appellant assigns a large number of alleged errors, but they relate in the main to the correctness of the various rulings on objections interposed by respondents during the reading of the deposition. No evidence was offered by defendants, and we are confronted merely with the question as to whether plaintiff established by such deposition a prima facie case, and this in turn depends upon the question as to

whether the exclusion by the court of certain portions of such deposition was proper. In order to show a breach of the bond it was incumbent on plaintiff company to prove an indebtedness due from Shumway to it, arising out of the agency contract, and this it sought to prove by its secretary, Jordine, through such depositions.

Defendants' objections were directed to the point that no proper foundation had been laid for the testimony sought to be elicited from such witness relative to the state of the account between plaintiff and Shumway, it appearing that such account was kept in book form by plaintiff. No appearance was made by defendants at the taking of such deposition, and the same is in the narrative, instead of by questions and answers. Appellant contends that none of the objections thereto were well taken, and further that they came too late, because not filed prior to the trial, citing § 7288, Revised Codes and Anderson v. First Nat. Bank, 6 N. D. 497, 72 N. W. 916, and Ueland v. Dealy, 11 N. D. 529, 89 N. W. 325. Sec. 7288 is as follows: "Exceptions to a deposition on the ground of incompetency or irrelevancy may be made at the time the same is offered in evidence; other exceptions to a deposition must be made in writing, specifying the grounds of objections, and filed in the cause before the commencement of the trial."

We have examined the cases above cited and do not deem them in point. They in no way support appellant's contention. The statute is plain, and clearly authorizes the practice pursued in this case; and indeed, such is the general, and we think the universal, practice in the district courts of this state. The objections interposed to such deposition, as before stated, related to the competency and relevancy of the testimony, and we will now consider the correctness of the rulings complained of.

The bond sued on provides "that the company's books shall, from time to time and at all times, be accepted and received, and shall in fact be, as against the agent and sureties, prima facie evidence of the amount of the indebtedness of the agent to the company, and of his accounts, dealings, and transactions with the company or on its behalf." The books of the company, therefore, were competent evidence as against these defendants, of the state of the account between Shumway and the plaintiff, provided a proper foundation was first laid for their introduction. Such books were not offered, however, but instead of so doing

plaintiff sought to prove the vital fact in issue, to wit, that Shumway was indebted to the company, by the deposition of its secretary, wherein such witness, without any foundation being first laid as to his qualifications to thus testify, other than showing that he was secretary of the company, testified to the conclusion that "the defendant Shumway is now indebted to the plaintiff company in the sum of $454.39." Defendants objected thereto, and moved to strike the testimony out as incompetent, and a mere conclusion, and no foundation having been laid, which objection was sustained and the motion granted. We think such rulings were clearly correct. The fact that the witness was plaintiff's secretary would not of itself qualify him to thus testify. Furthermore, such testimony was a naked conclusion of the witness; and, moreover, the record discloses that Shumway's account was kept in books of the company, and therefore such books were manifestly the best evidence of the state of the account.

In the face of the fact that Shumway's account was kept by plaintiff in its books of account, we cannot understand on what possible theory counsel for appellant can properly contend that the court erred in excluding exhibits "C" and "D," the former purporting to be a mere copy of the company's ledger account with Shumway, and the latter merely a detailed statement of said account claimed to have been taken from plaintiff's books. Such testimony was clearly incompetent. Greenville v. Ormand, 51 S. C. 58, 39 L.R.A. 847, 64 Am. St. Rep. 663, 128 S. E. 50; Paola Gas Co. v. Paola Glass Co. 56 Kan. 614, 54 Am. St. Rep. 598, 44 Pac. 621; Hunt v. Roylance, 11 Cush. 117, 59 Am. Dec. 140; Anchor Mill Co. v. Walsh, 108 Mo. 277, 32 Am. St. Rep. 600, 18 S. W. 904; John A. Tollman Co. v. Bowerman, 5 S. D. 197, 58 N. W. 569; Isbell v. Whalen, 25 S. D. 445, 127 N. W. 476; 2 Wigmore, Ev. § 1532.

Nor do we think there is any substantial merit in appellant's contention that respondents' objections came too late, and that consequently all of the deposition should have been received in evidence. While it is true that many of the objections were made after the testimony objected to had been read, and no motion was made to strike such testimony out, nevertheless, it does appear that as to the vital portions of such deposition motions were made and granted, striking the same out. This is especially true as to the portion wherein the witness stated

as his conclusion that Shumway "is now indebted to the plaintiff company in the sum of $454.39," and also as to the exhibits "C" and "D" aforesaid, and with these portions of the depositions thus stricken out such deposition did not make out a prima facie case for the plaintiff.

But appellant's counsel contend that, even though the deposition is treated as out of the case, still it was error not to have directed a verdict in plaintiff's favor for the sum of $259. Such contention is predicated upon certain admissions made by Shumway in a letter, exhibit "F," written by him to plaintiff's manager on November 9, 1908, wherein he stated, among other things: "I have collected $159 and you have advanced $100. Now, if I can get all this through, it will not be so bad, and I will get what more in I can, as I will have to get money before I can pay you the $159." There are other statements in such letter to the effect that Shumway had misappropriated certain funds in his hands belonging to plaintiff. Such letter was properly identified, and we think was admissible in evidence as showing an indebtedness due from Shumway to the company on November 9, 1908, growing out of the agency contract. Respondents contend, however, that such letter is no evidence of the condition of the account between the parties at the date such account was closed, which was nearly two months thereafter. We think, however, that, in the absence of any showing to the contrary, it must be presumed that the indebtedness thus admitted continued to exist, not only at the time the agency contract was terminated, but at the time of the commencement of this action. See Lawson, Presumptive Ev. p. 165, and cases cited. That such admission is binding on the sureties seems to be well established. 2 Brandt, Suretyship & Guaranty, 3d. ed. § 795, and cases cited. We do not, however, construe such letter as admitting an indebtedness of more than $159. The letter is somewhat ambiguous, and it does not appear therefrom when the $100, which Shumway admits was advanced, was payable, nor does it appear that the same had not been paid. And later on it is stated, "I will have to get money before I can pay you the $159." We think the reasonable inference to be drawn from this statement is that the latter amount is the sum he must pay in order to liquidate his indebtedness.

We conclude, therefore, that the trial court erred in not giving plaintiff judgment for the sum of $159, with interest thereon at the legal

rate from November 9, 1908; and it is accordingly ordered that the District Court vacate its judgment heretofore entered against this appellant, and enter a judgment against respondents, Goer and Bell, and in favor of such appellant, in accordance with the views above expressed, appellant to recover its costs and disbursements on this appeal.

W. S. LAUDER v. ALBERT HELEY et al.

(141 N. W. 201.)

Pleading — action — supersedeas undertaking.

1. The complaint in an action upon a supersedeas undertaking examined, and *held* not vulnerable to attack upon the ground that it fails to allege facts sufficient to constitute a cause of action.

Election contest — supersedeas — appeal — illegality of undertaking as defense.

2. In an election-contest proceeding the unsuccessful contestant applied for and secured, over contestee's protest, a supersedeas order upon condition that he should furnish an undertaking conditioned for the payment to contestee of the sum of $300 per month during the pendency of such supersedeas, in the event of his failure to prosecute an appeal with effect.

Held, that even conceding that such order was erroneously and improvidently issued, and even though its issuance was in excess of the court's power under the statute, and therefore void, such contestant, having received benefits thereunder, cannot be heard to urge a defense to a suit on such undertaking, based upon the alleged illegality of such order and consequent failure of consideration of such undertaking.

Contract void — public policy — estoppel.

3. The rule that a party seeking to enforce a contract void as against public policy cannot invoke an estoppel as against his adversary's attempted defense based on such fact, *held* not applicable.

Opinion filed March 18, 1913.

Appeal from District Court, Richland County; *C. A. Pollock*, Sp. J.

From an order overruling a demurrer to the complaint, defendants appeal.

Affirmed.

Dan R. Jones and *Geo. W. Freerks,* for appellants.

In election-contest cases, there is no provision of law authorizing a stay of proceedings, or a supersedeas of the judgment, or a suspension thereof. Rev. Codes, §§ 696–700; Fylpaa v. Brown County, 6 S. D. 634, 62 N. W. 962; Jayne v. Drorbaugh, 63 Iowa, 711, 17 N. W. 433; Fawcett v. Pierce County Super. Ct. 15 Wash. 342, 55 Am. St. Rep. 894, 46 Pac. 389; Allen v. Robinson, 17 Minn. 113, Gil. 90; Honey v. Davis, 38 Tex. 63; People ex rel. Wagenseil v. Stephenson, 98 Mich. 218, 57 N. W. 115.

The judgment in an election-contest case is self-executing, and there can be no stay. Rev. Codes, § 7215; State ex rel. Craig v. Woodson, 128 Mo. 497, 31 S. W. 105; State ex rel. Dodson v. Meeker, 19 Neb. 444, 27 N. W. 427; State ex rel. Hunt v. Kearney, 28 Neb. 103, 44 N. W. 90; Jayne v. Drorbaugh, 63 Iowa, 711, 17 N. W. 433; State ex rel. Lewis v. Marion County, 14 Ohio St. 515; Whitlock v. Wade, 117 Iowa, 153, 90 N. W. 587; 20 Enc. Pl. & Pr. 1244, note 4.

Administrator's bond given under an erroneous order of the court is not voluntary nor effective. Kerr v. Lowenstein, 65 Neb. 43, 90 N. W. 931; Leonard v. Cowling, 121 Ky. 631, 87 S. W. 812, 89 S. W. 131; Walker v. Tangipahoa, 111 La. 321, 35 So. 585; United States v. Morris, 153 Fed. 240; Davis v. Huth, 43 Wash. 383, 86 Pac. 654; Palmer v. Harris, 23 Okla. 500, 138 Am. St. Rep. 822, 101 Pac. 852; Gandy v. State, 10 Neb. 243, 4 N. W. 1019; Cooperrider v. State, 46 Neb. 84, 64 N. W. 372; Penn Mut. L. Ins. Co. v. Creighton Theatre Bldg. Co. 51 Neb. 659, 71 N. W. 279; Home F. Ins. Co. v. Dutcher, 48 Neb. 755, 67 N. W. 766; Prante v. Lompe, 74 Neb. 210, 104 N. W. 1150; Grelle v. Pinney, 62 Conn. 478, 26 Atl. 1106; Day v. Gunning, 125 Cal. 527, 58 Pac. 172; United States ex rel. Crawford v. Addison, 22 How. 174, 16 L. ed. 304.

Effective estoppel must be mutual. Unionville v. Martin, 95 Mo. App. 28, 68 S. W. 605; Gallaher v. Lincoln, 63 Neb. 339, 88 N. W. 505; Armfield v. Moore, 44 N. C. (Busbee, L.) 157.

Estoppel operates only in favor of the person who has been misled to his injury. Hubbard v. Mutual Reserve Fund Life Asso. 80 Fed. 681; Ketchum v. Duncan, 96 U. S. 659, 24 L. ed. 868; Scoby v. Sweatt, 28 Tex. 713; Crandall v. Mosten, 24 App. Div. 547, 50 N. Y. Supp.

145; Payne v. Burnham, 62 N. Y. 69; Nell v. Dayton, 43 Minn. 242, 45 N. W. 229.

Undertaking effecting nothing is without consideration. 2 Cyc. 924, and cases cited; Ham v. Greve, 41 Ind. 531; Olsen v. Birch, 1 Cal. App. 99, 81 Pac. 656; Gregory v. Obrian, 13 N. J. L. 11; Gimperling v. Hanes, 40 Ohio St. 117; Perez v. Garza, 52 Tex. 571; Lamoille Prob. Ct. v. Gleed, 35 Vt. 24.

Private parties cannot make binding contracts with respect to the tenure or compensation, fees, etc., of public office. Chitty, Contr. 11th Am. ed. 990–1016; Bliss v. Lawrence, 58 N. Y. 442, 17 Am. Rep. 273; Sherman v. Burton, 165 Mich. 293, 33 L.R.A.(N.S.) 87, 130 N. W. 667; Conklin v. Conklin, 165 Mich. 571, 131 N. W. 154; Waldron v. Evans, 1 Dak. 11, 46 N. W. 607; Buck v. Walker, 115 Minn. 239, 132 N. W. 205, Ann. Cas. 1912D, 882; Bodenhofer v. Hogan, 142 Iowa, 321, 134 Am. St. Rep. 418, 120 N. W. 659; Bailey v. Sibley Quarry Co. 166 Mich. 321, 129 N. W. 17; Dunkley v. Marquette, 157 Mich. 339, 122 N. W. 126, 17 Ann. Cas. 523; Forbes v. McDonald, 54 Cal. 99; Ham v. Smith, 87 Pa. 63; Hunter v. Nolf, 71 Pa. 282; Martin v. Wade, 37 Cal. 168; Gray v. Hook, 4 N. Y. 449; Gaston v. Drake, 14 Nev. 175, 33 Am. Rep. 548.

Assignment of salary of an office—void as against public policy. Ryall v. Rowles, 1 Ves. Sr. 348, 2 White & T. Lead. Cas. in Eq. 734; Davis v. Marlborough, 1 Swanst. 74, 2 Wils. Ch. 130; Pollock, Contr. 289; Greenhood, Pub. Pol. 593; 2 Am. & Eng. Enc. Law, 2d ed. 1033; Sweeney v. Karsky, 25 Neb. 197, 58 Pac. 813.

Estoppel can never be predicated on a misconception of the law, on part of either or both parties to a transaction. Ross v. Banta, 140 Ind. 120, 34 N. E. 865, 39 N. E. 732; Fletcher v. Holmes, 25 Ind. 458; McGirr v. Sell, 60 Ind. 249; Long v. Anderson, 62 Ind. 537; Lash v. Rendell, 72 Ind. 475; Hosford v. Johnson, 74 Ind. 479; Estis v. Jackson, 111 N. C. 145, 32 Am. St. Rep. 784, 16 S. E. 7; 16 Cyc. 720.

Purcell & Devit and *W. S. Lauder,* for respondent.

In election-contest case, where a bond or supersedeas is voluntarily given by the defeated party, who accepts and retains the benefits arising from the bond, both principal and sureties are estopped to deny its validity or their liability thereon as obligors. Love v. Rockwell, 1 Wis. 383; Clark v. Miles, 2 Pinney (Wis.) 432; Gudtner v. Kilpatrick,

14 Neb. 347, 15 N. W. 708; Braithwaite v. Jordan, 5 N. D. 233, 31 L.R.A. 238, 65 N. W. 701; 5 Cyc. 748, and cases under note 13.

Bond providing for payment of *all* damages, good. Adams v. Thompson, 18 Neb. 541, 26 N. W. 316; Dunterman v. Storey, 40 Neb. 447, 58 N. W. 949; Flannagan v. Cleveland, 44 Neb. 58, 62 N. W. 297; Stevenson v. Morgan, 67 Neb. 207, 108 Am. St. Rep. 629, 93 N. W. 180.

Such instrument may be enforced as a common-law bond. Daniels v. Tearney, 102 U. S. 415, 26 L. ed. 187.

Benefits accepted under such bond creates liability. Ferguson v. Landram, 5 Bush, 230, 96 Am. Dec. 350; Van Hook v. Whitlock, 26 Wend. 43, 37 Am. Dec. 246; State v. Cannon, 34 Iowa, 322; Co-operative Asso. v. Rohl, 32 Kan. 663, 5 Pac. 1; Barratt v. Grimes, 10 Kan. App. 181, 63 Pac. 272; Dennard v. State, 2 Ga. 137; 1 Enc. Pl. & Pr. 1019; Dobler v. Strobel, 9 N. D. 104, 81 Am. St. Rep. 530, 81 N. W. 37.

Benefits had by the giving of the bond which would not have been received without the bond. Mueller v. Kelly, 8 Colo. App. 527, 47 Pac. 72; Ryan v. Webb, 39 Hun, 435; Hester v. Keith, 1 Ala. 316; Coughran v. Sundback, 13 S. D. 119, 79 Am. St. Rep. 886, 82 N. W. 507; Babcock v. Carter, 67 Am. St. Rep. 193, monographic note.

The bond was not given as part of any agreement between parties; it was given in compliance with the order of the court; such bond is not void as being against public policy. Sweeney v. Karsky, 25 Nev. 197, 58 Pac. 813; Coughran v. Sundback, 13 S. D. 119, 79 Am. St. Rep. 886, 82 N. W. 507.

Where a bond is voluntarily made, and the principal enjoys the benefits secured, and a breach occurs, it is too late to question its validity. United States v. Hodson, 10 Wall. 395, 19 L. ed. 937; Daniels v. Tearney, 102 U. S. 415, 26 L. ed. 187; Wisconsin Trust Co. v. Chapman, 121 Wis. 479, 105 Am. St. Rep. 1032, 99 N. W. 341; McVey v. Peddie, 69 Neb. 525, 96 N. W. 166; Stevenson v. Morgan, 67 Neb. 207, 108 Am. St. Rep. 629, 93 N. W. 180; United States Fidelity & G. Co. v. Ettenheimer, 70 Neb. 144, 113 Am. St. Rep. 783, 97 N. W. 227, 99 N. W. 652; Douglass v. Unmack, 77 Conn. 181, 107 Am. St. Rep. 25, 58 Atl. 710; Arthur v. Sherman, 11 Wash. 254, 39 Pac. 670; McFadden v. Fritz, 110 Ind. 1, 10 N. E. 120; Capital Lumbering

Co. v. Learned, 36 Or. 544, 78 Am. St. Rep. 792, 59 Pac. 454; 2 Herman, Estoppel, §§ 1040, et seq. See also §§ 1043–1045; 11 Am. & Eng. Enc. Law, 446–447, and cases cited, note 1 p. 447—also note 8, p. 446; Bigelow, Estoppel, chap. 24, p. 642.

FISK, J. This is an appeal from an order overruling a demurrer to the complaint, the ground of the demurrer being that such complaint fails to state facts sufficient to constitute a cause of action.

The complaint is too lengthy to incorporate in this opinion, nor do we deem it necessary so to do in order to intelligently present the points of attack made against it. The facts briefly stated are as follows:

At the general election held in Richland county on November 8, 1910, the defendant Frank Heley and one George E. Moody were opposing candidates for the office of sheriff; Moody receiving 1,513 votes, and Heley 1,502 votes, according to the official canvass; that thereupon the said canvassing board duly declared Moody elected, and a certificate of election in due form was issued to him by the county auditor.

On December 12, 1910, Heley served upon Moody a notice of election contest, wherein he alleged, in substance, that he, and not Moody, had received a plurality of the legal votes cast at said election, and that he, and not Moody, was duly elected to said office; thereafter Moody duly served his answer to said notice of contest, putting in issue all the allegations contained in such notice, and alleging generally that he, Moody, was in truth and in fact duly elected to such office. In January, 1911, said contest was tried, and in February the court made and filed its findings of fact and conclusions of law in Moody's favor, and judgment was given and entered accordingly, and notice of the entry thereof duly served upon the attorneys for the contestant, Heley. No appeal was taken therefrom, and at the expiration of sixty days the same became final and irrevocable.

Moody duly qualified for said office, and on January 4, 1911, demanded possession thereof from Heley, who was then in possession, having been elected thereto at the general election of 1908. Heley refused to surrender possession of the office, and on January 5, 1911, Moody instituted mandamus proceedings against Heley to oust him from such office, basing his claim upon his prima facie right to the

office by virtue of the certificate of election. An answer and return to the alternative writ of mandamus was interposed, and said mandamus proceedings duly tried, and the district court, on February 6, 1911, duly made an order that a peremptory writ of mandamus issue against said Heley, and on February 7, 1911, a peremptory writ was issued and such notice thereof duly served upon the attorneys for the said Heley.

Upon the entry of judgments in the said contest case and the said mandamus proceeding, Heley applied for and obtained a supersedeas order in both cases, under which Heley was given the right to retain possession of said office pending an appeal to the supreme court from the judgments entered therein; upon this application it was stipulated, in open court, that the office of sheriff was worth, net, $300 per month to the incumbent thereof, which stipulation was made for the purpose of fixing the value of said office in order to avoid further controversy in any subsequent proceeding regarding the question of the value of said office. Pursuant to the conditions of said order, the defendants executed the undertaking sued upon.

No appeal was taken in the election-contest case, but an appeal from the judgment in the mandamus proceeding was taken, and subsequently such appeal was in all things dismissed. The undertaking sued on was given in the contest proceeding, no reference being made therein to the mandamus case.

Pursuant to the order of the court granting to him a stay of proceedings and a supersedeas upon the giving of the undertaking, Heley remained in possession of the said office, and appropriated to his own use all the fees, compensation, and emoluments of the same up to the second day of May, 1911, when he surrendered and turned over to Moody the said office. Heley has not paid or caused to be paid to Moody, or any other person, any sum of money, or other thing of value, in discharge of his said obligation to pay to the said Moody the sum of $300 per month, net, for and during the time which the said Heley held and occupied said office after the entry of said judgments.

For a valuable consideration Moody duly assigned, transferred, and set over to plaintiff all his rights under said bond, as trustee, for the benefit of the said plaintiff and other persons.

Did the lower court err in overruling such demurrer? Appellants' counsel argue, with much skill and vehemence, that it did, while re-

spondent's counsel contend with equal ability and earnestness to the contrary. As we understand the contentions of appellants' counsel, they, in brief, are that the order granting the supersedeas in the contest case conditioned upon the execution and filing of the supersedeas undertaking sued on was not within the power and authority of the court to make, and consequently such undertaking is not legally enforceable, as such order furnishes no valid consideration therefor, even though by reason thereof Heley was permitted to retain possession of the office and has received the emoluments thereof. The basis for such contention is, in the language of counsel, "that it is against public policy to in any way transfer the possession of a public office, or to assign the avails, fees, salary or emoluments thereof."

Counsels' contention, in other words, is predicated upon the assumption that the effect of the transaction by which such order was made and the undertaking given amounts to a contract in the ordinary sense of the term, to which contract Moody is a party, and by the terms of which he agreed, in consideration of the undertaking, to permit appellant to remain in and to perform the official duties of such office, collecting and appropriating to himself the fees and emoluments thereof. Such a contract, if made, would concededly be void as against public policy.

Respondent's counsel, for the purposes of this appeal, admit that the court improperly made the supersedeas order aforesaid, but they contend that such order is not *void,* but merely *erroneous.* They also assert that the same was made by the court over Moody's protest, and that in no sense can he properly be charged with even consenting thereto. In other words, respondent is not in the position that he would be in had Moody voluntarily entered into a contract permitting appellant to remain in the office in consideration of his giving such undertaking. After mature deliberation we find ourselves unable to concur in the views entertained by appellants' counsel. We think the basic fallacy of their contention is quite apparent on mature reflection. Moody can, in no proper sense, be charged with a violation of the rule of public policy referred to. There was no contract entered into by him in contravention of such rule. The *court,* by its concededly erroneous order, and not Moody, made it possible for Heley to retain such office, and the court was led into such error presumably by the

persuasive argument of Heley's attorneys. In view of this, and more especially after Heley has reaped the benefits of such order, is there any sound reason based on public policy or otherwise, why he or his sureties should be permitted, in a court of law, to reverse such position, and there assert as a defense to a suit on the undertaking that Heley, even in good faith, led the court into error in issuing a void order, and as a consequence that the undertaking given pursuant thereto is a nullity and without consideration? We know of no such rule, and the argument in support thereof is contrary to our sense of natural justice and fair play. Having succeeded in persuading the court to issue the order, neither Heley nor his bondsmen will be heard to urge the invalidity thereof as a reason for escaping liability on the undertaking. The authorities cited and relied on by appellants' counsel to the effect that estoppel cannot be relied on as a reason for preventing a defense to an illegal contract, or one entered into in violation of the rule of public policy, are not in point, as Moody entered into no such contract. He had no alternative in the matter, but was forced to take what the court deemed proper to give him, and he was given the undertaking in lieu of the office. Wherein, therefore, can he be charged with a breach of any rule of public policy? As before stated, respondent does not base his right of recovery upon any contract which Moody was instrumental in bringing about, but solely upon a quasi contract brought into existence by the court. But appellants, in effect, say that Moody should, or at least could have ignored the supersedeas order thus made and have brought a proceeding to oust Heley from such office. Granting that he possessed such right, does it necessarily follow that he was bound to do this or lose all his rights? We think not; nor do we think any court has ever extended the rule of public policy to such extent. As an ordinary law-abiding citizen would do, Moody recognized and abided the court's mandate, refraining, as he had a lawful right to do, from incurring the risk of contempt of court by ignoring and treating such order as a nullity. Must he suffer by so doing? Clearly not. He did not, by such conduct, become a party to any contract contravening public policy or otherwise, and the numerous authorities cited by appellants' counsel have no applicability whatever to the facts here presented. To say that Moody, by the transaction in question, in effect assigned the avails of the office during

the period he was kept out of the same, is farfetched and unfounded. Such assumption is predicated upon the false theory that in some manner Moody entered into a *contract* to this effect. We can spell out of the facts no such conclusion.

Again, appellants' counsel assert that "Heley had possession of the office of sheriff when Moody had the certificate of election and a judgment determining that he (Moody) was elected," and they inquire, "Could Moody become legally entitled to the stipulated avails—$300 a month—while Heley held the office and did the work?" and they proceed to answer such question by saying that "we submit again that, under the laws of North Dakota, no one can legally draw or receive the fees or emoluments of a public office, directly or indirectly, by order of the court or otherwise, except he be in possession or perform the duties thereof." Such is not our understanding of the law; but, even granting this to be correct, still Heley being an intruder or usurper, we think he would be under a legal duty to account to Moody for the fees and emoluments thereof collected by him, and such we understand are the authorities. See cases cited in note to Andrews v. Portland, 10 Am. St. Rep. at p. 284. Also Woodruff, Quasi Contr. 636; Kreitz v. Behrensmeyer, 149 Ill. 496, 24 L.R.A. 59, 36 N. E. 983 and cases therein cited; Booker v. Donohoe, 95 Va. 359, 28 S. E. 584.

It is no doubt settled by the weight of authority that where a *de facto* officer has collected the salary or fees during his incumbency, the *de jure* officer cannot maintain an action against the county or other municipality to enforce payment of the same to him. El Paso County v. Rhode, 16 L.R.A.(N.S.) 794, and note. He may, however, recover the same from the *de facto* officer. No rule of public policy forbids his doing the latter. On the contrary, a sound public policy favors this. Kreitz v. Behrensmeyer, supra. This being true, what principle of sound public policy forbids a recovery upon a bond given to secure the payment thereof under facts like those here presented? We know of none.

Furthermore, we are agreed that respondent's counsel are correct in asserting that appellants, under the facts, are, and on the plainest principles of justice should be, estopped from urging the defense which they here urge. Heley, by virtue of the supersedeas, obtained on his application, was permitted to remain in the office and to receive the

fees and emoluments thereof. The undertaking sued on was given as a condition to granting him this privilege, and he ought not to be heard at this time to contend that such undertaking was without consideration and is null and void. Love v. Rockwell, 1 Wis. 383; Clark v. Miles, 2 Pinney (Wis.) 432; Gudtner v. Kilpatrick, 14 Neb. 347, 15 N. W. 708; Stevenson v. Morgan, 67 Neb. 207, 108 Am. St. Rep. 629, 93 N. W. 180; Ferguson v. Landran, 5 Bush, 230, 96 Am. Dec. 350; Daniels v. Tearney, 102 U. S. 415, 26 L. ed. 187; United States v. Hodson, 10 Wall. 395, 19 L. ed. 937; 16 Cyc. 787–790.

The United States Supreme Court in Daniels v. Tearney, 102 U. S. 415, 26 L. ed. 187, uses language which is applicable to the case at bar, as follows: "Not to apply the principle of estoppel to the bond in this case would, it seems to us, involve a mockery in judicial administration and a violation of the plainest principles of reason and justice."

We readily concede the correctness of appellants' contention that, where a contract is void as against public policy, a person who has accepted a benefit thereunder will not be estopped to defend against such contract in an action brought to enforce the same; but this exception to the rule of estoppel has no application under the facts in the case at bar, for the obvious reason, as we have heretofore observed, that Moody is in no way responsible for the undertaking in question or the supersedeas order, nor can it be said that he consented thereto. The court granted the same against Moody's protest.

Nor is there any merit in appellants' contention that the bond never became operative, because no appeal was in fact ever taken in the contest case. The undertaking, when construed in the light of the supersedeas order therein referred to, plainly provides for the payment to Moody of the sum of $300 per month during the time he shall be kept out of the office by reason of the granting of such supersedeas.

After duly considering all of appellants' contentions and the authorities relied on by them, we are impelled to the conclusion that the complaint is not vulnerable to the attack made upon it, and the order appealed from is accordingly affirmed.

SAMUEL RANDALL and Duncan Ferguson, Golden Valley Land & Cattle Company, a Corporation, and Stondall Land & Investment Company, a Corporation, v. JOHN JOHNSTONE and Carrie Johnstone by J. A. Miller, Her Guardian *Ad Litem*.

(141 N. W. 352.)

Conveyances — deeds — grantees — grantor — real parties in interest — separate actions.

1. Where two separate deeds are executed to different grantees while the grantor is out of possession, and the two grantees bring separate actions in the name of the grantor as nominal plaintiff for their separate uses, such use plaintiffs are the real parties in interest. The said actions are separate and distinct and between different parties, and the decision of one suit is not a bar to the bringing of the other.

Judgment — damages — use plaintiff.

2. Following Christ v. Johnstone, *ante*, 6, 140 N. W. 678, *held*, that the judgment entered for damages against the defendant who was in possession of the land is limited to the times wherein the use plaintiff is entitled to recover.

Opinion filed March 18, 1913. Rehearing denied May 7, 1913.

Appealed from the District Court for Billings County, NUCHOLS, J. Modified.

Purcell & Diver, T. F. Murtha, and *John Carmody,* for respondents.

Nothing except errors appearing on the judgment roll can be reviewed in the Supreme Court, without a proper statement of the case specifying facts for review. Brandenburg v. Phillips, 18 N. D. 200, 119 N. W. 542; Farmers' & M. Nat. Bank v. Davis, 8 N. D. 83, 79 N. W. 998; Ricks v. Bergsvendsen, 8 N. D. 578, 80 N. W. 768.

Action may be brought in name of grantor, for the benefit of the real parties in interest. Galbraith v. Payne, 12 N. D. 173, 96 N. W. 258.

Causes of action can only be joined when all the causes are common to all of the parties. Rev. Codes, § 6877, subdiv. 7; Hoffman v. Wheelock, 62 Wis. 434, 22 N. W. 713, 716; Mosier v. Beale, 43 Fed. 358 (on California statute); 1 Abbott, Pleadings, 772.

In the absence of the evidence—it will be presumed that the parties

litigated, without objection, all questions determined by the court. Baker v. Byerly, 40 Minn. 489, 42 N. W. 395; Stevens v. Stevens, 82 Minn. 1, 84 N. W. 457.

The grantor in deeds that are void, as against the grantees, can enforce any right that could have been enforced had not the deeds been given. Livingston v. Proseus, 2 Hill, 526; Galbraith v. Payne, 12 N. D. 172, 96 N. W. 258; Chamberlain v. Taylor, 92 N. Y. 348.

Heffron & Baird and *J. A. Miller,* for appellant.

A claim or demand indivisible in its nature cannot be split so as to authorize several actions for the same claim; if a recovery is had for part of such demand, it will be regarded as an election to accept such part for the whole. 23 Cyc. 436, 437, and cases cited on pages 437, 438; Continental Ins. Co. v. H. M. Loud & Sons Lumber Co. 93 Mich. 139, 32 Am. St. Rep. 494, 53 N. W. 394; 23 Cyc. 1174, and note 85; 1 Van Fleet, Former Adjudication, § 59, also, §§ 70–144 and 156.

The principle which prevents the splitting up of causes of actions is a rule of justice, and is not to be classed among technicalities. Dutton v. Shaw, 35 Mich. 431; Dils v. Justice, 137 Ky. 822, 127 S. W. 472; 23 Cyc. 1178; Freeman, Judgm. § 241, and cases cited.

One recovery, although it be for a part only of the entire injury, is effectual as an estoppel. Pierro v. St. Paul & N. P. R. Co. 39 Minn. 451, 1 Am. St. Rep. 673, 40 N. W. 520.

The law requires causes of action to be prosecuted as a whole, to the end that litigation may cease. Kline v. Stein, 46 Wash. 546, 123 Am. St. Rep. 940, 90 Pac. 1041.

Assigning portions of land or contracts does not permit the different assignees to bring separate actions in their behalf. Craig v. Broocks, — Tex. Civ. App. —, 127 S. W. 572; Collins v. Gleason, 47 Wash. 62, 125 Am. St. Rep. 891, 91 Pac. 566; Stone v. Pratt, 25 Ill. 26; Loomis v. Robinson, 76 Mo. 488; Cornett v. Moore, 30 Ky. L. Rep. 280, 97 S. W. 380; Phillips v. Portsmouth, 112 Va. 164, 70 S. E. 502; Bendernagle v. Cocks, 19 Wend. 207, 32 Am. Dec. 448, note; Mallory v. Dawson Cotton Oil Co. 32 Tex. Civ. App. 294, 74 S. W. 953.

Damages for the use and occupation of real estate prior to acquiring title cannot be recovered. Masterson v. Hagan, 17 B. Mon. 328; Sibbald's Estate, 18 Pa. 249; McFadden v. Johnson, 72 Pa. 335, 13 Am. Rep. 681; 3 Sutherland, Damages, § 992.

BURKE, J. In the year 1906 the Golden Valley Land & Cattle Company were the owners of section 11, twp. 138, r. 105, and in that year entered into a contract to sell said land to the defendant Johnstone. This contract was soon mutually rescinded, but Johnstone thereafter decided to stand upon his contract, and took possession of the said land. Thereafter and while he was in such possession, the Golden Valley Land & Cattle Company sold one quarter of said section to the plaintiff Randall, and another quarter section to a man named Christ. Christ and Randall brought separate actions against the defendant Johnstone to quiet title to the respective tracts purchased by them. Those complaints were first brought in the respective names of Christ and Randall, but were afterwards amended in each instance to show that the Golden Valley Land & Cattle Company brought the action for the use of the said defendants. The case entitled the Golden Valley Land & Cattle Company for the use and benefit of A. T. Christ against Johnstone was tried by the court without a jury, and at the conclusion of the testimony the court announced that he would hold in favor of the plaintiff. Before any formal order was entered to that effect the defendant in the other action moved the court to dismiss this action on the ground that the matter in controversy is the same as was set up in the Christ Case, which had just been tried by the court; that the matter in controversy was the validity of the same contract between the Golden Valley Land & Cattle Company and the defendant Johnstone, and that the Golden Valley Land & Cattle Company has elected to split its case in regard to the contract for the sale of said land, and has elected to try the issues in regard to said contract in the first, or Christ Case, and is now barred from bringing this action or any other action in regard to any other portion of said section. This objection was overruled by the trial court, and is one of the principal errors relied upon by appellant.

(1) Appellant cites many cases holding that a plaintiff cannot split his cause of action and try it piecemeal. These cases are merely authorities upon the propositions of *res judicata;* the gist of these holdings being that, where the same parties have once litigated a question, it will be binding upon them thereafter. The appellants in the case at bar make the mistake of assuming that the case of Christ v. Johnstone and RANDALL v. JOHNSTONE are between the same parties, because the

Golden Valley Land & Cattle Company happens to be the nominal plaintiff in each case. The actions are really separate and distinct, and are between different parties. The nominal plaintiff may know nothing about the pendency of those actions. It has no control over them. The plaintiff Randall might not desire to try his cause of action along the same lines used by the plaintiff Christ. He may have discovered new evidence for use in his trial. For this reason the motion of the defendant was properly denied by the trial court.

(2) After the above objection had been overruled by the trial court, the trial was had by the court upon the same evidence received in the case of Christ v. Johnstone, ante 6, 140 N. W. 678, just decided by this court, and judgment was entered in favor of the Golden Valley Land and Cattle Company for the use of the premises at the rate of $125 a year for five years. The evidence shows that the use plaintiff, Randall, did not purchase the premises until the year 1909, nor have an assignment of the claim for damages from the parties who owned the land prior to that time. Following the case of Christ v. Johnstone, supra, we hold that it was not proper for the trial court to grant any personal relief to the nominal plaintiffs in the action, nor was it proper to allow the use plaintiff, Randall, damages for the occupation of the land prior to the time he acquired the ownership thereof. It therefore follows that the judgment of the trial court should be modified and the sum of $625 damages be reduced to $250. Appellants will recover their costs on this appeal.

JOHN S. SNEVE et al. v. GEORGE S. SCHWARTZ et al.

(141 N. W. 348.)

Plaintiffs and defendants entered into the written executory contract set up in the opinion, whereby they were to exchange certain properties at a future date after abstracts of title had been furnished and the deeds deposited in escrow. Plaintiff brings this suit, alleging false and fraudulent representations upon the part of defendants which induced him to enter into said contract. Defendants demur upon the ground that the complaint does not state facts sufficient to constitute a cause of action. In answer thereto it is *held*:—

Executory contract — action — notice of rescission.

(1) That where the contract is entirely executory and the defendant has parted with nothing of value, and where plaintiffs bring the action promptly upon discovering that they have been defrauded, the said action is sufficient notice of plaintiffs' election to rescind said contract.

Sale — deeds — abstract — delay.

(2) Where defendants had until the 15th of November to furnish the last abstract of title and deposit the deed in escrow, and the plaintiffs served their complaint forty-four days thereafter, such delay is not fatal to the bringing of the action, as the plaintiffs would need some time to look up the reasons why the deed and abstract had not been furnished, to ascertain whether or not defendants had misrepresented material statements to them in obtaining their consent to the contract. Also the plaintiffs would need time to consult attorneys, and the attorneys would need time to investigate the facts and properly prepare the complaint.

Pleading — contract — incapacity — fraud.

(3) The allegation of the complaint that one of the plaintiffs was "mentally incapable of transacting business" is not given as a reason for rescinding the contract, but as a fact going to show fraud upon the part of the defendants in inducing him to sign the contract.

Pleading — title — record.

(4) The complaint alleges upon information and belief that the defendants have no title to the premises agreed by them to be conveyed. In view of the fact that the defendants might have had title which was not of record, this is the only allegation that the plaintiffs could safely make, and it is held sufficient.

Scienter — pleading.

(5) The complaint alleges sufficient words of scienter, which words are set forth in the opinion.

Representations — reliance upon — pleading.

(6) Complaint examined, and *held* that it alleges that the plaintiffs relied upon the representations of defendant and would not otherwise have entered into the same.

Agreement to convey.

(7) *Held* that the complaint sufficiently alleges that defendants represented that they would convey to plaintiffs a one-half interest in the said nursery stock.

Allegations—materiality.

(8) The contract, which is attached to the complaint, shows that the defendants agreed to convey a one-half interest in said nursery stock, and when read in connection with the complaint is sufficient to show that such allegations were material.

Damages — pleading.

(9) The complaint alleges that the property parted with by plaintiffs was worth $20,000, and that they have received nothing in return. This is sufficient allegation of damages.

False representations — reliance upon.

(10) *Held* that the complaint alleges that the plaintiffs relied upon the false representations of the defendants.

Deed — possession — escrow — conclusion of law.

(11) The complaint alleges that the defendants had wrongfully obtained possession of the deed from plaintiffs, which was to be deposited in escrow, and asked that said deed be canceled. *Held* not to be a statement of a conclusion of law.

Pleading — status quo.

(12) Where the complaint shows that the defendants have parted with nothing of value, it is unnecessary to allege that they have been placed *in status quo*.

Pleading — demurrer — value.

(13) Not grounds for demurrer that the complaint does not show that the defendants knew more about the value of the nursery stock than did the plaintiffs.

Fraud — setting aside contract — deed — possession of — damages.

(14) Defendants claim that no fraud could have been inflicted upon the plaintiffs by the making of an executory contract. The fraud alleged is sufficient to justify the court in setting aside the contract itself, and the further allegation that defendants have wrongfully obtained possession of a deed to plaintiffs' land is sufficient allegation of damages to sustain the complaint.

Opinion filed March 5, 1913. Rehearing denied May 7, 1913.

Appeal from the District Court for Ward County, *Leighton*, J.

Affirmed.

F. B. Lambert and *Geo. A. McGee*, for appellants.

No disaffirmance of the alleged fraudulent contract or notice rescission has ever been made. To be relieved from fraud, one must rescind. N. D. Rev. Codes, § 5380; Sonnesyn v. Akin, 14 N. D. 248, 104 N. W. 1026; Higby v. Whittaker, 8 Ohio, 198; Walters v. Miller, 10 Iowa, 427; Melton v. Smith, 65 Mo. 315.

The intention of rescind must be made evident. Mullin v. Bloomer, 11 Iowa, 360; American Wine Co. v. Brasher Bros. (C. C.) 13 Fed. 595; Carney v. Newberry, 24 Ill. 203; Gaty v. Sack, 19 Mo. App. 470;

Davis v. Read (C. C.) 37 Fed. 418; Grymes v. Sanders, 93 U. S. 55, 23 L. ed. 798, 10 Mor. Min. Rep. 445; Ayres v. Mitchell, 3 Smedes & M. 683; Lawrence v. Dale, 3 Johns. Ch. 23.

Consideration paid cannot be recovered unless demand has been made for the money paid, or property delivered, before suit is brought. Weeks v. Robie, 42 N. H. 316; Swazey v. Choate Mfg. Co. 48 N. H. 200; I. L. Corse & Co. v. Minnesota Grain Co. 94 Minn. 331, 102 N. W. 728.

Until contract is rescinded, an action to recover payments cannot be maintained. Herman v. Gray, 79 Wis. 182, 48 N. W. 113; Ludington v. Patton, 111 Wis. 208, 86 N. W. 571; Potter v. Taggart, 54 Wis. 395, 11 N. W. 678; Bostwick v. Mutual L. Ins. Co. 116 Wis. 392, 67 L.R.A. 705, 89 N. W. 538, 92 N. W. 246.

Until rescission, a voidable sale remains such, with voidable title in the purchaser. Mechem, Sales, §§ 148, 889, 892, 901, 907; Donaldson v. Farwell, 93 U. S. 631, 23 L. ed. 993, note; Fechheimer v. Baum, 43 Fed. 719, 2 L.R.A. 153, and note; Morrow Shoe Mfg. Co. v. New England Shoe Co. 24 L.R.A. 417, 6 C. C. A. 508, 18 U. S. App. 256, 57 Fed. 685; King v. Jacobson, 35 N. Y. S. R. 808, 12 N. Y. Supp. 584; 8 Rose's Notes (U. S.) 1024; 23 Century Dig. col. 174; 17 Decen. Dig. 42–44; Ditton v. Purcell, 21 N. D. 648, 36 L.R.A.(N.S.) 149, 132 N. W. 347.

The action should be instituted, or notice given, promptly upon the discovery of fraud. N. D. Rev. Codes, § 5380; 2 Pom. Eq. Jur. § 897.

An allegation of mental weakness is not an allegation of insanity. N. D. Rev. Codes, § 7409; S. D. Civ. Code 1905, § 13; 8 Words & Phrases, 7213; Nelson v. Thompson, 16 N. D. 295, 112 N. W. 1058; Batman v. Snoddy, 132 Ind. 480, 32 N. E. 327; 31 Cyc. 59; 9 Cyc. 459; Sandels & H. Dig. (Ark.) § 7217.

An allegation as to title to real property cannot be made on information and belief. Hathaway v. Baldwin, 17 Wis. 616; State ex rel. Kennedy v. McGarry, 21 Wis. 500; Union Lumbering Co. v. Chippewa County, 47 Wis. 245, 2 N. W. 281; Steinberg v. Saltzman, 130 Wis. 419, 110 N. W. 198.

It is necessary to allege intention to deceive, and that representations were known to be false. Words of scienter are necessary. Arthur v. Griswold, 55 N. Y. 400, 7 Mor. Min. Rep. 46; Brackett v. Griswold,

112 N. Y. 454, 20 N. E. 376; Southern Development Co. v. Silva, 125 U. S. 248, 31 L. ed. 678, 8 Sup. Ct. Rep. 881, 15 Mor. Min. Rep. 435; Barnett v. Stanton, 2 Ala. 181; McDonald v. Trafton, 15 Me. 225.

A false representation must be knowingly made. Southern Development Co. v. Silva, 125 U. S. 248, 31 L. ed. 679, 8 Sup. Ct. Rep. 881, 15 Mor. Min. Rep. 435; 5 Am. & Eng. Enc. Law, 320; Oberlander v. Spiess, 45 N. Y. 177; Meyer v. Amidon, 45 N. Y. 169; Marsh v. Falker, 40 N. Y. 565; Chester v. Comstock, 40 N. Y. 576, note; Duffany v. Ferguson, 66 N. Y. 484; Wakeman v. Dalley, 51 N. Y. 27, 10 Am. Rep. 551; McIntyre v. Buell, 132 N. Y. 192, 30 N. E. 396; Daly v. Wise, 132 N. Y. 306, 16 L.R.A. 236, 30 N. E. 837; Kelly v. Gould, 47 N. Y. S. 5, 19 N. Y. Supp. 349, affirmed in 141 N. Y. 596, 36 N. E. 320; Kerr, Fr. p. 382.

The gravamen of the action is actual fraud. Kountze v. Kennedy, 147 N. Y. 124, 29 L.R.A. 360, 49 Am. St. Rep. 651, 41 N. E. 414; Maxwell, Pl. p. 194.

In an action of deceit, it is necessary to allege a scienter. (Ala. 1889) Clark v. Dunham Lumber Co. 86 Ala. 220, 5 So. 560; (Fla. 1887) Williams v. McFadden, 23 Fla. 143, 11 Am. St. Rep. 345, 1 So. 618; (Ga. 1858) Wooten v. Callahan, 26 Ga. 366; (1861) 32 Ga. 382; (Miss. 1860) Mizell v. Sims, 39 Miss. 331; (Mo. 1892) Fenwick v. Bowling, 50 Mo. App. 516; (N. Y. 1858) Mabey v. Adams, 3 Bosw. 346; 1895 Thomas v. Snyder, 77 Hun, 365, 28 N. Y. Supp. 877.

It must clearly appear that the complaining party relied upon the representations made, and acted upon them. Johnson v. Kindred State Bank, 12 N. D. 336, 96 N. W. 588; 23 Century Dig. 1690.

Damages must be alleged and proved. Maxwell, Code Pl. 16; 20 Cyc. 108; Marshall-McCartney Co. v. Halloran, 15 N. D. 71, 106 N. W. 293; First Nat. Bank v. North, 2 S. D. 480, 51 N. W. 96; Hayrock v. Surerus, 9 N. D. 28, 81 N. W. 36; Nelson v. Grondahl, 12 N. D. 133, 96 N. W. 299.

All the elements of actionable fraud must be alleged. 31 Cyc. 56; 16 Cyc. 231; 6 Cyc. 325, 326; Russell v. Meyer, 7 N. D. 335, 47 L.R.A. 637, 75 N. W. 262.

Noble, Blood, & Adamson, for respondents.

The plaintiffs received nothing, and it is therefore impossible for them to retain anything, or to tender anything back. The allegations

of notice and disaffirmance are sufficient. Zebley v. Farmer's Loan & T. Co. 139 N. Y. 461, 34 N. E. 1067; Warren v. Providence Tool Co. 19 R. I. 360, 3 Atl. 876; King v. Zekle, 53 Fla. 940, 43 So. 586; Porter v. Armour & Co. 241 Ill. 145, 89 N. E. 356; Ballard v. Golob, 34 Colo. 417, 83 Pac. 376.

The allegations of mental weakness are sufficient. Gavitt v. Moulton, 119 Wis. 35, 96 N. W. 395; Robinson v. Robinson, 203 Pa. 400, 53 Atl. 253; Re Hess, 48 Minn. 504, 31 Am. St. Rep. 665, 51 N. W. 614; 9 Cyc. 460.

This action can be maintained for the recovery of the purchase price. Worley v. Nethercott, 91 Cal. 512, 25 Am. St. Rep. 209, 27 Pac. 767; Mims v. Cobbs, 110 Ala. 577, 18 So. 309; Haile v. Smith, 128 Cal. 415, 60 Pac. 1032.

BURKE, J. The plaintiffs, husband and wife, were on the 29th day of September, 1909, the owners of a half section of land in Ward county. Upon that date they entered into the following written contract with the defendants: " . . . the parties of the first part, for and in consideration of the parties of the second part, transferring by good and sufficient warranty deed, as shown by an abstract of title to be furnished free and clear of all encumbrance, of all the following described real estate [describing a 5-acre tract and also a certain block 11], and the one-half interest in the following described nursery stock [describing over 100,000 trees and shrubs]. The parties of the second part, for and in consideration of the transfer of said property by the parties of the second part, to convey to the parties of the second part by good and sufficient warranty deed, free and clear of all encumbrance save and except a mortgage of $2,100, and abstract of title to said property to be furnished [describing the said farm]. Parties of the first part hereby agree to pay all interest up to and including December 1, 1909, on said $2,100 mortgage. It is hereby agreed between the parties that each party to this contract shall pay the 1909 taxes on the property which they agree to convey by this contract. The parties to this contract have this day made and executed deeds in accordance with this contract, except the block 11 heretofore described; deed to same to be delivered November 15, 1909. Said deeds to be deposited in the Second National Bank of Minot in escrow, until such time as the abstract of title to the various pieces of real estate are filed and an opportunity is

given the parties herein to examine the same." (Signed by the plaintiffs and defendants.)

On the 29th of December, 1909, this suit was instituted. The complaint is too long to be set out in full in this opinion, and we will merely state its contents briefly. First, it is alleged that the plaintiffs owned the farm land described. Next, the written contract is set up, and that the said farm was worth the sum of $10,000. It is then alleged that the plaintiff, John S. Sneve was of unsound mind, which fact was known to the defendants. It is further alleged that false and fraudulent representations were made by the defendants to plaintiffs, as follows: "That the defendants alleged that they were the owners of the 5-acre tract and said block 11, and a half interest in the said nursery stock, which representations were untrue. Plaintiffs alleged on information and belief that the defendants never owned any of said property. It is further alleged that the defendants represented that they had done the business in the said nursery line to the amount of $20,000 in the previous year; that they had a contract with the city of Minot to furnish to such city all trees and shrubs that such city might need, and that they had a contract, or practically so, with the Soo Railroad Company, whereby they were to furnish said railway with all the trees and shrubs that it should need between the city of Minneapolis and the Rocky Mountains. It is further alleged that defendants represented that the nursery stock was worth the sum of $10,000. The complaint then alleges that all of these representations were false and made to induce the plaintiffs to enter into said contract, and that had it not been for the mental condition of said John S. Sneve the contracts would not have been made. It is further alleged that the defendants never executed deeds to the property upon their part to be conveyed, or deposited the same in escrow, but that the plaintiffs executed the deed to their said farm in favor of the defendants, but that said deed was not deposited in escrow, but fell into the hands of the defendants, by whom it was recorded, and that said defendants went into possession of said farm, and have ever since maintained such possession. That the rental value of such farm is the sum of $500 per annum, and the plaintiffs pray judgment that the said contract be declared void and canceled; that the deed executed by plaintiffs be declared null and void, and be canceled of record, and that the plaintiffs recover damages for the use of the land. To this complaint the

defendants interposed a demurrer on the ground that said complaint does not state facts sufficient to constitute a cause of action, and urge fourteen reasons in support thereof. We will take up and dispose of these in the order named in the brief.

(1) The first and most serious objection raised to the complaint is that it contains no allegation of rescission, thus raising the question as to the necessity of giving notice to the adverse party of the intention to rescind before bringing action. The general rule unquestionably is that the party believing himself defrauded must elect to rescind and make his election known in some manner to the other party. This is founded upon the plainest principles of justice. The rule, however, is not broader than the principles of justice upon which it is founded. In executory contracts, where the parties have merely agreed to transfer their property at some future time, the necessity for the notification is not so imperative as in contracts fully executed, because the other party knows that until the negotiations are finally completed there is a possibility of some disagreement necessitating the abandonment thereof. So, in the case at bar, where neither party was to part with his property until a future date, there would be less reason why one of the parties should notify the other of his intention to rescind on account of fraud. And this for the reason that the party in the wrong might rectify his wrongful acts, before the day of final settlement. In other words, the plaintiff herein, who was merely to deposit his deed in escrow, might not feel justified in rescinding the contract because he had discovered that the defendants had no title to the premises which they were obligated to convey, because the defendants might acquire the property by the time the deeds were to be formally transferred. The defendants had until November 15 within which to deposit their last deed and furnish the abstract. This action was begun on the 29th of December following, which was about as soon as the plaintiffs could be expected to act. We conclude, therefore, that in this action at least there was no necessity for the plaintiffs notifying the defendants of their election to rescind, otherwise than by the bringing of an action promptly upon learning of the deceit practised upon them. Brown v. Search, 131 Wis. 109, 111 N. W. 210.

(2) Second, it is urged that even if notice of rescission can be given by action, that in this case such action was not begun promptly after

the discovery of the fraud. As noted above, the defendants had until November 15, 1909, to deposit the deed to block 11, and to furnish an abstract of its title. The complaint was dated December 29, 1909, about fortyfour days thereafter. It is but reasonable to suppose that upon the 15th of November the plaintiffs would make some inquiry as to why defendants had not deposited the deed, and to make investigations with a view to learning whether or not defendants had title to the property. They would have also to investigate the other representations made by defendants to learn if they were fraudulent, and to make investigations as to the financial responsibility of the defendants to aid them in electing whether they should sue for damages or rescind. After that it would take some time to consult an attorney and for the attorney to investigate the facts sufficiently to draw an intelligent complaint. We do not believe that fortyfour days is much too long for these events to transpire. The action was, we think, brought in sufficient time.

(3) It is urged that the allegation that one of the plaintiffs was "mentally incapable of transacting business" is not an allegation that the plaintiff was an idiot or insane person, and therefore no ground whatever for decreeing a rescission of the contract made by him. The answer to this proposition is that plaintiffs are not relying upon the mental incapacity for the purpose of vitiating the contract, but allege fraud, and have alleged that the defendants knew that said plaintiff was weak mentally, and that this fact added to their general fraudulent conduct.

(4) Defendants object to the allegation relative to the defendants' title to the real estate being made upon information and belief. We do not see that this makes the complaint demurrable. The plaintiffs could not learn all possible sources of title to the land of defendant from the records. It was always possible that the defendants had an unrecorded deed to the premises. It would not therefore be safe for the plaintiffs to make the positive allegation that defendants had no title, they could only be sure they had no recorded title. If they were informed, and believe such fact, the proper way to allege it was upon information and belief.

(5) Defendants complain that there is no allegation that defendants made false or untrue representations regarding their property. A

perusal of the complaint will show the contrary. The allegations that the defendants wrongfully claimed to own the land and the nursery stock, and those regarding the magnitude of the business, are all alleged to be false. These statements are certainly words of scienter.

(6) Defendants claim that there is no allegation in the complaint that the plaintiffs relied upon the misrepresentations of the defendants. In their brief defendants say that the complaint affirmatively shows that they were to rely upon the abstracted title to said premises. This contention is not borne out by the facts. In paragraph 13 of the complaint it is said "that the plaintiff John S. Sneve relied upon the same by reason of the enfeebled condition of his mind, and that had not the said John S. Sneve been in such enfeebled mental condition the said contract would not have been made." We think the above language is general and relates to all allegations, and is sufficient to show that plaintiffs relied upon the misrepresentations of the defendant, although it is coupled with the further allegation that his mental condition was weak at the time.

(7) Defendants say that there is no allegation in the complaint that the defendants claimed that they owned or had in their possession at Minot the nursery stock a half interest of which was agreed to be given to plaintiffs. The complaint in this particular is not clear, but says "that the only other consideration named in the said agreement for the conveyance of said premises to be conveyed by these plaintiffs to the defendant was a one-half interest in the following described nursery stock." While this language is not as clear as it should be, we think it sufficient, and besides there are other allegations of fraud, even should we eliminate this one allegation.

(8) The defendants say that the allegation as to the earnings of the nursery company,—the contracts with the Soo Railroad and with the city of Minot, are not material if true, and could not possibly have any effect upon the contract. This is based upon the seventh objection, and is met by the same answer. It is certain that the allegations of misrepresentation are sufficient, but it is possible that the complaint should be amended so as to show more clearly that the defendants had agreed to convey a one-half interest in said nursery stock. The contract between the parties, which is attached to the complaint, shows positively that the defendants were to convey this property, and this

is sufficient to sustain the action of the trial court in overruling the demurrer upon this point.

(9) Defendants say that there is no allegation that the plaintiffs were damaged by the deal. This is also contrary to the record. Plaintiffs say that they have parted with property worth $20,000, and that they have received nothing. This is not a model allegation of damage, but we think it is sufficient to support the complaint.

(10) The defendants say that there is no allegation that the contract was made on account of the false and fraudulent representations. As we have already pointed out, the complaint does show that the plaintiff relied upon the misrepresentations of defendant. This allegation remains good even though coupled with the further allegation that the plaintiff John S. Sneve was feeble-minded, and would not have made the contract had he not been mentally deficient. We think a fair reading of the complaint shows that the false representations of the defendants were relied upon by the plaintiffs.

(11) It is alleged that the complaint states a conclusion of law when it says that the defendants wrongfully obtained possession of the deed. It is undoubtedly defendants' intention that the facts should have been set up so that the court could see whether or not the defendants "wrongfully obtained possession of the same." Taken in connection with the allegations that the deed was to be deposited in escrow until the defendants had likewise deposited their deeds, we think the allegation sufficient.

(12) It is claimed that the complaint does not show that the defendants have been placed *in status quo*. The complaint positively alleges that the defendants did not own any of the property which was upon their part to be conveyed, and we think this equivalent to a statement that plaintiffs had received nothing upon the contract. It is further alleged that the "defendants have never delivered or offered to deliver to the plaintiffs the deed to the premises, or property described in said contract to be by them transferred, and have not deposited the same in escrow as provided for in the terms of said contract." Under those circumstances an allegation that the plaintiffs have returned said property would be superfluous.

(13) Defendants say that there is no allegation in the complaint, showing that defendants knew any more about the value of the nursery

stock than did the plaintiffs. The complaint alleges that the defendants represented themselves to be the owners of the said stock, which stock was worth $10,000. It is further alleged that said stock did not belong to the defendants at all, and was not worth to exceed $1,000. Even, if we concede that the plaintiffs might have inspected the stock, and have learned from such inspection that it was worth but $1,000, yet there remains the allegation that the defendants wrongfully represented themselves as owners of a half interest therein.

(14) The last objection to the complaint is that no fraud could possibly have been inflicted upon the plaintiffs by the making of an executory agreement. All considerations were to be passed upon first, and then mutually turned over at an appointed time, and each was to own his own property until then. The answer to this is that the complaint alleges that the contract is still in existence, and that the defendants are unable to perform their part of it because they never have owned the property they have agreed to convey. Under those circumstances, surely the plaintiffs are entitled to have the contract set aside.

Our conclusion is that the plaintiffs have set forth their cause of action in their own way, and that it should be liberally construed in the interests of justice to all concerned. To say that the facts disclosed by the complaint are not actionable would be equivalent to saying that the plaintiffs must lose their land entirely and receive nothing in return. We do not believe the technical rules of law require any such holding.

The order of the trial court overruling the demurrer is affirmed.

Goss, J., being disqualified, took no part in this decision.

STATE OF NORTH DAKOTA v. EMMET F. APLEY.

(— L.R.A.(N.S.) —, 141 N. W. 740.)

From a conviction for statutory rape, defendant appeals. *Held:*—

Statutory rape — cross-examination — error — prostitution — prosecutrix.

(1) It was error to exclude cross-examination tending to show that the

Note.—The question of evidence of specific instances to prove character for chastity in prosecution for rape is considered in notes in 14 L.R.A.(N.S.) 714, and 80 Am. Dec. 368.

prosecutrix, about a year before the alleged rape upon her by defendant, had been an inmate of a house of prostitution for a period of three weeks.

Proof of unchastity — character — consent — immaterial — age.

(2) Such testimony, when elicited under cross-examination of prosecutrix, was admissible as proof of unchastity and immoral character of the prosecutrix as bearing directly upon her credibility, even though she was under the age of consent, and her consent to the commission of the acts charged as constituting the offense was immaterial.

Evidence — physician — error — testimony — cross-examination — witnesses.

(3) It was proper for the state to show, by the testimony of an examining physician, the physical condition of the prosecutrix ten days or two weeks after the alleged commission of the crime. But it was error to exclude the testimony offered by the defendant, tending to explain or refute the apparent corroborative testimony of such physician. The rulings complained of left the physician's testimony unexplained, and tending to corroborate the prosecutrix, without affording defendant the offered defense thereto or his explanation thereof, as was sought to be elicited by cross-examination of the prosecutrix herself.

Statements of prosecutrix — bad faith — cross-examination — rape.

(4) Defendant should have been permitted to fully examine a state's witness concerning whether said witness had made certain statements to the magistrate from whom she, as complainant, had procured a warrant to issue for the arrest of the prosecutrix for alleged grand larceny, two days before defendant's arrest on this charge, when during the trial of this case she had testified that such warrant had been procured merely that prosecutrix might be taken into custody so that thereafter prosecutrix could, with safety, institute this prosecution for rape against defendant. The testimony disclosed by reasonable inference that the prosecutrix may have been actuated by bad faith in instituting these proceedings, and full cross-examination should have been allowed of the state's witness concerning such arrest of the prosecutrix so caused under alleged prearrangement with the witness testifying; and the exclusion of the cross-examination offered was error.

Crime — evidence — explanations — error — exclusion of testimony.

(5) The crime if committed was done while the wife and other children of defendant were temporarily absent on a visit. The state offered testimony showing opportunity, and from which the inference might be drawn, that defendant had kept the prosecutrix at home to prostitute her; and such was the state's theory of why she did not leave with the wife and other children, as it had been previously arranged she should do. The wife was permitted to testify that she did not take prosecutrix with her, because "she was afraid to," but was not permitted to relate the specific reasons for her fears and reasons why the prosecutrix did not accompany her on the visit. Defendant sought to show that the reason for such fears was because of information

obtained shortly before, from the prosecutrix and others, tending to establish her immorality and unchastity generally, and causing the belief in the defendant and wife that prosecutrix might become ungovernable and troublesome in such respect if so taken; which testimony was excluded. This evidence offered should have been received, and defendant should also have been permitted to testify to his explanation of how prosecutrix came to remain at home with him.

Cross-examination — witnesses — error — prejudicial — testimony — relevancy.

(6) Upon cross-examination defendant was examined concerning the death of his first wife, who had died more than ten years before, and from the matters so brought out the jury may have concluded that her death may have been due in part to his refusal to furnish her with a doctor during childbirth. This and much other irrelevant testimony so elicited during his cross-examination may have been prejudicial.

Opinion filed April 14, 1913. Rehearing denied May 19, 1913.

From a judgment of the District Court for Stutsman County, *Coffey*, J., defendant appeals.

Reversed.

W. S. Lauder and *John Knauf*, for appellant.

The *weight* of the testimony in a given case depends quite as much upon the *character* of the witnesses as upon their *number*, and upon cross-examination it is competent to go fully into the character, habits, and antecedents of a witness, as bearing upon his credibility. Territory v. O'Hare, 1 N. D. 44, 44 N. W. 1003; State v. Kent (State v. Pancoast) 5 N. D. 541, 35 L.R.A. 518, 67 N. W. 1052; State v. Malmberg, 14 N. D. 526, 105 N. W. 614; State v. Rozum, 8 N. D. 557, 80 N. W. 477.

Collateral facts touching the credibility of a witness cannot be shown by the testimony of other witness. They are reachable only through the avenue of liberal cross-examination. Shepard v. Parker, 36 N. Y. 517; State v. Haynes, 7 N. D. 70, 72 N. W. 923, and cases cited.

If a witness admits himself to have been guilty of heinous offenses, the jury would justly give him less credit than if his life and conduct had been pure and upright. Shepard v. Parker, supra; LaBeau v. People, 34 N. Y. 233; Newcomb v. Griswold, 24 N. Y. 298; Real v. People, 42 N. Y. 279; Wilbur v. Flood, 16 Mich. 40, 93 Am. Dec. 203; Foster v. People, 18 Mich. 266; 1 Greenl. Ev. 14th ed. Brown v. Com.

102 Ky. 227, 43 S. W. 214; Neace v. Com. 23 Ky. L. Rep. 125, 62 S. W. 733; Camp v. State, 3 Ga. 417; People v. Evans, 72 Mich. 367, 40 N. W. 473; Brennan v. People, 7 Hun, 171; State v. Long, 93 N. C. 543; State v. Duffey, 128 Mo. 549, 31 S. W. 98; Gillett, Indirect & Collateral Ev. § 91, note on p. 136.

A witness who has been examined upon collateral matters for the purpose of affecting his credibility may not be contradicted by other witnesses, as this would raise a multiplicity of issues and tend to confuse the jury. State v. Haynes, 7 N. D. 70, 72 N. W. 923; State v. Malmberg, 14 N. D. 523, 105 N. W. 614.

In cross-examination there is a great difference in the latitude allowed in the case of a mere witness, and a defendant charged with a serious, specific crime. State v. Hazlet, 16 N. D. 444, 113 N. W. 374; State v. LaMont, 23 S. D. 174, 120 N. W. 1104.

The defendant cannot be prepared to vindicate himself against any charge which may be insinuated in the form of cross-examination. Com. v. Jackson, 132 Mass. 16, 44 Am. Rep. 299, note; State v. Carson, 66 Me. 116, 2 Am. Crim. Rep. 58; People v. Crapo, 76 N. Y. 288, 32 Am. Rep. 302; People v. Brown, 72 N. Y. 571, 28 Am. Rep. 183; Gifford v. People, 87 Ill. 210; Hayward v. People, 96 Ill. 492; Rice, Crim. Ev. 215; Richardson v. Gage, 28 S. D. 390, 133 N. W. 692; Owens v. State, 39 Tex. Crim. App. 391, 46 S. W. 240; Ball v. State, 44 Tex. Crim. Rep. 489, 72 S. W. 384; Dabney v. State, 82 Miss. 252, 33 So. 973.

The general rule is against receiving evidence of another offense. Coleman v. People, 55 N. Y. 81; Shaffner v. Com. 72 Pa. 60, 13 Am. Rep. 649; People v. Molineux, 168 N. Y. 291, 62 L.R.A. 193, 61 N. E. 286; Bishop, New Crim. Proc. § 1120.

It is elementary that where on examination of a witness, a subject is gone into or opened up, the adverse party may, on cross-examination, go fully into it and develop it in all its bearings. People v. Flaherty, 79 Hun, 48, 29 N. Y. Supp. 641; Taugher v. Northern P. R. Co. 21 N. D. 123, 129 N. W. 747; Parker v. State, 62 Tex. Crim. Rep. 64, 136 S. W. 453.

Specific acts with others than defendant may be shown to rebut corroborating circumstances, as where a physician testified, as in this case, that the hymen was ruptured. 33 Cyc. 1480, 1481, and cases cited;

State v. Mobley, 44 Wash. 549, 87 Pac. 815; State v. Gereke, 74 Kan. 196, 86 Pac. 160, 87 Pac. 759; People v. Fong Chung, 5 Cal. App. 587, 91 Pac. 105; People v. Betsinger, 34 N. Y. S. R. 819, 11 N. Y. Supp. 916; Shirwin v. People, 69 Ill. 55, 1 Am. Crim. Rep. 650; People v. Flaherty, 79 Hun, 48, 29 N. Y. Supp. 641; State v. Height, 117 Iowa, 650, 59 L.R.A. 437, 94 Am. St. Rep. 323, 91 N. W. 935; Nugent v. State, 18 Ala. 521; Wilson v. State, — Tex. Crim. Rep. —, 67 S. W. 106; Knowles v. State, 44 Tex. Crim. Rep. 322, 72 S. W. 398; State v. Bebb, 125 Iowa, 494, 101 N. W. 189.

The complaint of the prosecutrix made to others as to the acts of the defendant are no part of the res gestæ. Greenl. Ev. § 213; State v. Clark, 69 Iowa, 294, 28 N. W. 606; State v. Richards, 33 Iowa, 420; 33 Cyc. 1463, 1464, and cases cited.

The case of the State v. Werner, 16 N. D. 83, 112 N. W. 60, distinguished. Pleasant v. State, 15 Ark. 624; State v. Langford, 40 Am. St. Rep. 277, and note 282, 45 La. Ann. 1177, 14 So. 181; State v. Jones, 61 Mo. 232; Oleson v. State, 11 Neb. 276, 38 Am. Rep. 366, 9 N. W. 38; Wood v. State, 46 Neb. 58, 64 N. W. 355; State v. Freeman, 100 N. C. 429, 5 S. E. 921; State v. Campbell, 20 Nev. 122, 17 Pac. 620; 42 Century Dig. Div. B. § 68 p. 70; State v. Murphy, 17 N. D. 58, 17 L.R.A.(N.S.) 609, 115 N. W. 84, 16 Ann. Cas. 1133; 1 Greenl. Ev. 16th ed. § 110; 1 Rice, Civ. Ev. §§ 212 et seq. Gillett, Indirect & Collateral Ev. pp. 290 et seq. Wharton, Crim. Ev. 8th ed. § 262; Underhill, Crim. Ev. § 93; Lund v. Tyngsborough, 9 Cush. 36; People v. Lane, 100 Cal. 379, 34 Pac. 856; People v. Tucker, 104 Cal. 440, 38 Pac. 195; Cole v. State, 125 Ga. 276, 53 S. E. 958; Warrick v. State, 125 Ga. 133, 53 S. E. 1027; Johnson v. State, 129 Wis. 146, 5 L.R.A. (N.S.) 809, 108 N. W. 55, 9 Ann. Cas. 923; State v. Mickler, 73 N. J. L. 513, 64 Atl. 148; Stevison v. State, 48 Tex. Crim. Rep. 601, 89 S. W. 1072; Tilson v. Terwilliger, 56 N. Y. 273; 2 Jones, Ev. §§ 347, 348, and notes.

If sufficient time intervenes between the act and declarations concerning it, to give opportunity for reflection, the declarations of the prosecutrix made to others are inadmissible. State v. Murphy, 17 N. D. 58, 17 L.R.A.(N.S.) 609, 115 N. W. 84, 16 Ann. Cas. 1133.

While an appellate court will not disturb a judgment for an immaterial error, yet it should appear beyond a doubt that the error com-

plained of did not and could not have prejudiced the rights of the party objecting. Boston & A. R. Co. v. O'Reilly, 158 U. S. 334, 39 L. ed. 1006, 15 Sup. Ct. Rep. 830; Deery v. Cray, 5 Wall. 795, 18 L. ed. 653; Norfolk & P. Traction Co. v. Miller, 98 C. C. A. 453, 174 Fed. 607; Gilmer v. Higley, 110 U. S. 47, 28 L. ed. 62, 3 Sup. Ct. Rep. 471; Taggart v. Bosch, — Cal. —, 48 Pac. 1092; Thomas v. Carey, 26 Colo. 485, 58 Pac. 1093; Norfolk & W. R. Co. v. Briggs, 103 Va. 105, 48 S. E. 521; Henry v. Colorado Land & Water Co. 10 Colo. App. 14, 51 Pac. 90; Comaskey v. Northern P. R. Co. 3 N. D. 279, 55 N. W. 732; Moore v. Booker, 4 N. D. 558, 62 N. W. 607; Hegar v. De Groat, 3 N. D. 354, 56 N. W. 150; McKay v. Leonard, 17 Iowa, 569; Freeman v. Rankins, 21 Me. 446; Hayne, New Trial, § 287.

Honorable *Andrew Miller,* Attorney General, *Geo. M. McKenna,* State's Attorney, and *Geo. W. Thorp,* and *Russell D. Chase,* for respondent.

The character of the prosecutrix for chastity may be impeached, but this must be done by general evidence of her reputation, and not by evidence of specific acts of intercourse with others than the defendant. 3 Greenl. Ev. § 214; People v. McLean, 71 Mich. 309, 15 Am. St. Rep. 263, 38 N. W. 917; McCombs v. State, 8 Ohio St. 643; Com. v. Regan, 105 Mass. 593; State v. Hilberg, 22 Utah, 27, 61 Pac. 217 (impeachment for want of chastity must be confined to general reputation for chastity in community); State v. Williamson, 22 Utah, 248, 83 Am. St. Rep. 780, 62 Pac. 1022; State v. Ogden, 39 Or. 195, 65 Pac. 449; McQuirk v. State, 84 Ala. 435, 5 Am. St. Rep. 381, 4 So. 775.

Where the prosecutrix is under age, she cannot be impeached by cross-examination as to her past conduct concerning illicit intercourse. People v. Johnson, 106 Cal. 289, 39 Pac. 622; People v. Harris, 103 Mich. 473, 61 N. W. 871; People v. Abbott, 97 Mich. 484, 37 Am. St. Rep. 360, 56 N. W. 862.

Reputation for truth and veracity may be inquired into, the same as of an adult. State v. Smith, 18 S. D. 341, 100 N. W. 740; State v. Stimpson, 78 Vt. 124, 1 L.R.A.(N.S.) 1158, 62 Atl. 14, 6 Ann. Cas. 639; State v. Rash, 27 S. D. 185, 130 N. W. 92, Ann. Cas. 1913D, 656; State v. Whitesell, 142 Mo. 467, 44 S. W. 332; State v. Hilberg, 22 Utah, 27, 61 Pac. 215; State v. Williamson, 22 Utah, 248, 83 Am. St. Rep. 780, 62 Pac. 1022.

Admissions of prosecutrix are hearsay and inadmissible. State v.

Shettleworth, 18 Minn. 208, Gil. 191; Greenl. Ev. §§ 362 & 537; State v. Emeigh, 18 Iowa, 122; State v. Yocum, 117 Mo. 622, 23 S. W. 765; State v. Brady, 71 N. J. L. 360, 59 Atl. 6; State v. Sudduth, 52 S. C. 488, 30 S. E. 408; Brown v. State, 127 Wis. 193, 106 N. W. 536, 7 Ann. Cas. 258; People v. McLean, 71 Mich. 308, 15 Am. St. Rep. 263, 38 N. W. 917; State v. Malmberg, 14 N. D. 523, 105 N. W. 614; State v. Haynes, 7 N. D. 70, 72 N. W. 923; Becker v. Cain, 8 N. D. 615, 80 N. W. 805; 1 Thomp. Trials, Last ed. § 469.

The matter of the extent and nature of the cross-examination is largely in the discretion of the trial court, and depend upon the nature of the evidence introduced and the circumstances of each case. 1 Thomp. Trials, Last ed. §§ 464, 465; State v. Kent (State v. Pancoast) 5 N. D. 516, 35 L.R.A. 518, 67 N. W. 1052; Territory v. O'Hare, 1 N. D. 30, 44 N. W. 1003; State v. Rozum, 8 N. D. 548, 80 N. W. 477; State v. McGahey, 3 N. D. 293, 55 N. W. 753; State v. Ekanger, 8 N. D. 559, 80 N. W. 482; State v. Malmberg, 14 N. D. 523, 105 N. W. 614; Shepard v. Parker, 36 N. Y. 517; La Beau v. People, 34 N. Y. 223; Real v. People, 42 N. Y. 279.

The defendant, by going upon the witness stand and testifying generally to his mode of living, put his general character for his whole life in issue, as to respectability, integrity, criminal acts, —sexual inclination,—and cross-examination following was proper. 4 Elliott Ev. § 2721; 1 Elliott, Ev. § 168; Underhill, Crim. Ev. § 78; 12 Cyc. p. 412, and cases cited; Taylor v. Com. 13 Ky. L. Rep. 860, 18 S. W. 852; People v. Garcia, — Cal. —, 59 Pac. 576; Siberry v. State, 133 Ind. 677, 33 N. E. 681; State v. Richards, 126 Iowa, 497, 102 N. W. 439; State v. Sterrett, 68 Iowa, 76, 25 N. W. 936; State v. LeBlanc, 116 La. 822, 41 So. 105; State v. Thornhill, 174 Mo. 364, 74 S. W. 832; Holloway v. State, 45 Tex. Crim. Rep. 303, 77 S. W. 14.

The cross-examination of defendant was warranted by his own evidence in chief, and does not relate to collateral matters. Gillett, Indirect & Collateral Ev. § 90; 1 Thomp. Trials, Last ed. § 415; State v. Kent (State v. Pancoast) 5 N. D. 516, 35 L.R.A. 518, 67 N. W. 1052; 3 Camp, Enc. Ev. pp. 803–823, and cases cited, pp. 839–844, and cases cited including N. D. cases; Schnase v. Goetz, 18 N. D. 594, 120 N. W. 553; Hogen v. Klabo, 13 N. D. 319, 100 N. W. 847; State v. Raice,

24 S. D. 111, 123 N. W. 709; State v. La Mont, 23 S. D. 174, 120 N. W. 1104.

The credibility of the prosecutrix, who was under age, was not affected by proof of other acts of intercourse, or that she was in the family way, as such evidence was immaterial and related only to collateral matters. Abbott, Civil Jury Trials, p. 233; Dutcher v. Howard, 15 Wash. 693, 47 Pac. 28; Dole v. Wooldredge, 142 Mass. 161, 7 N. E. 832; State v. McGahey, 3 N. D. 293, 55 N. W. 753; Schaser v. State, 36 Wis. 429; State v. Hopkins, 50 Vt. 316, 3 Am. Crim. Rep. 357; People v. Smallman, 55 Cal. 185; Branstetter v. Morgan, 3 N. D. 290, 55 N. W. 758; State v. Moeller, 20 N. D. 114, 126 N. W. 569; Hebert v. Hebert, 20 S. D. 85, 104 N. W. 911; Com. v. Hughes, 183 Mass. 221, 66 N. E. 717; Thomp. Trials, Last ed. §§ 481, 483; 8 Enc. Pl. & Pr. pp. 118–126, and cases cited; State v. Kent (State v. Pancoast) 5 N. D. 516, 35 L.R.A. 518, 67 N. W. 1057.

The whole complaint made by the prosecutrix to others, of the acts of the defendant immediately thereafter, and not the bare statement of the fact of complaint, as a part of the *res gestæ*, may be shown. State v. Werner, 16 N. D. 83, 112 N. W. 60; 10 Camp, Enc. Ev. p. 589; People v. Gage, 62 Mich. 271, 4 Am. St. Rep. 854, 28 N. W. 835; State v. Imlay, 22 Utah, 156, 61 Pac. 557; People v. Glover, 71 Mich. 303, 38 N. W. 874 (3 days); Proper v. State, 85 Wis. 615, 55 N. W. 1038; People v. Rich, 133 Mich. 14, 94 N. W. 375; People v. Marrs, 125 Mich. 376, 84 N. W. 284; State v. Fitzsimon, 18 R. I. 236, 49 Am. St. Rep. 766, 27 Atl. 446, 9 Am. Crim. Rep. 343; State v. Carpenter, 124 Iowa, 5, 98 N. W. 775; State v. Peter, 14 La. Ann. 527; Gillett, Indirect & Collateral Ev. §§ 253, 254, and cases in notes; Mayes v. State, 64 Miss. 329, 60 Am. Rep. 58, 1 So. 733; Cox v. State, — Tex. Crim. Rep. —, 44 S. W. 157; State v. Brown, 125 N. C. 606, 34 S. E. 105; State v. Hutchinson, 95 Iowa, 566, 64 N. W. 610; State v. Cook, 92 Iowa, 483, 61 N. W. 185; State v. Watson, 81 Iowa, 380, 46 N. W. 868; State v. Andrews, 130 Iowa, 609, 105 N. W. 215; State v. Peterson, 110 Iowa, 647, 82 N. W. 329; State v. Carroll, 67 Vt. 477, 32 Atl. 235; Ellis v. State, 25 Fla. 702, 6 So. 768; Burt v. State, 23 Ohio St. 394; People v. Gage, 62 Mich. 271, 4 Am. St. Rep. 854, 25 N. W. 837; People v. Glover, 71 Mich. 303, 38 N. W. 874; Bannen v. State, 115 Wis. 317, 91 N. W. 107, 965; Proper v. State, 85 Wis. 615, 55 N.

W. 1035; People v. Rich, 133 Mich. 14, 94 N. W. 375; People v. Marrs, 125 Mich. 376, 84 N. W. 284; Hannon v. State, 70 Wis. 448, 36 N. W. 1; State v. Hutchinson, 95 Iowa, 566, 64 N. W. 610; State v. Watson, 81 Iowa, 380, 46 N. W. 868; State v. Andrews, 130 Iowa, 609, 105 N. W. 215; State v. Neel, 21 Utah, 151, 60 Pac. 510; State v. Daugherty, 63 Kan. 473, 65 Pac. 695; State v. Parker, 134 N. C. 209, 46 S. E. 511; State v. Werner, 16 N. D. 83, 112 N. W. 60; 10 Camp, Enc. Ev. p. 591, and cases cited; State v. Peterson, 110 Iowa, 647, 82 N. W. 329; Com. v. Cleary, 172 Mass. 175, 51 N. E. 746; McCombs v. State, 8 Ohio St. 643; Hornbeck v. State, 35 Ohio St. 277, 35 Am. Rep. 608; Laughlin v. State, 18 Ohio, 99, 51 Am. Dec. 444; Johnson v. State, 17 Ohio, 593; State v. Byrne, 47 Conn. 465; State v. Kinney, 44 Conn. 153, 26 Am. Rep. 436; Hill v. State, 5 Lea, 725; Phillips v. State, 9 Humph. 246, 49 Am. Dec. 709; Com. v. Sallager, 3 Clark (Pa.) 127; Caudle v. State, 34 Tex. Crim. Rep. 26, 28 S. W 810; 34 Cyc. 1642, and numerous cases cited; 33 Cyc. 1470 (title after offense), and notes and cases cited.

Upon cross-examination, if a witness admits having made the statement by proving which it is intended to impeach him, no further proof is needed or allowable. 10 Enc. Pl. & Pr. 288; State v. Baldwin, 36 Kan. 1, 12 Pac. 318, 7 Am. Crim. Rep. 377; Swift & Co. v. Madden, 165 Ill. 41, 45 N. E. 979, 1 Am. Neg. Rep. 20; State v. McGahey, 3 N. D. 293, 55 N. W. 754; 12 Cyc. 585, and cases cited.

Goss, J. Criminal information was filed in the district court of Logan county, charging defendant, Emmet F. Apley, with the crime of rape, alleged to have been committed on or about July 4, 1911, upon the person of one Lillian Apley, a child of defendant and under the age of sixteen years. Upon defendant's plea of not guilty a trial was had in said county, resulting in a disagreement of the jury. Subsequently, on the state's application, a change of venue was taken to Stutsman county, where a trial resulted in a verdict of guilty. Thereupon defendant was sentenced to fourteen years' imprisonment. He has appealed upon error assigned in the admission and rejection of testimony.

An outline of the facts is necessary to an understanding of the case. The defendant was at the time about forty-eight years of age; the prosecutrix, his daughter, not quite fifteen. Defendant had been twice mar-

ried, his first wife having died more than ten years ago. He had four children by each wife. Shortly after the death of his first wife, his three children, one having died, were placed in an orphans' home in Minnesota. From there prosecutrix was taken when an infant by others, and when about seven years old her foster parents took her to Portland, Oregon. She remained in Oregon and Washington, with her whereabouts unknown to the defendant, until September, 1910, and during which time she had never seen her father. In August of that year she was at Walla Walla, Washington, and there came into the custody of a police matron. Persons interested then notified her father of the fact and some details of the conduct causing her detention. From there she returned to Portland, Oregon, where she was placed in charge of the juvenile court, from which she was committed to a so-called "house of detention." About a month after the notice was received of her whereabouts at Walla Walla, defendant forwarded $30 to pay Lillian's railroad fare back to his home, in Logan county, but before the receipt of the money the girl had returned to Portland. The money was returned. In June, 1911, following, after correspondence with officials of the Salvation Army, and on their advice, defendant went to Portland and found his girl in the juvenile court at that place, which court committed her to his charge. He returned with her to his home in this state, arriving here on Thursday, June 22d, Lillian then first meeting defendant's second wife and the four children by his second marriage. Defendant had in June, 1911, shortly before going to Portland, sold his homestead, and had preparations made to move to Canada. Lillian's two full brothers, Jesse and Frank, had been committed with her to the orphans' home in Minnesota years before. On August 10, 1910, Jesse, then about sixteen years old, returned to defendant's home, but left it about the 1st of January, 1911. Before Lillian returned, arrangements had been made for Mrs. Apley to take her four children and visit her people in Minnesota before the family removed to Canada. Defendant was to remain and perfect final arrangements for the family's removal. At first Lillian was to accompany Mrs. Apley on this visit, but pursuant to later arrangements between the defendant and his wife she remained behind. Mrs. Apley and the children left on this visit June 29, 1911, and remained away about a week, during which time it is charged defendant carnally knew his daughter repeatedly between June 30th and

July 5th. On July 5th defendant left his home for Napoleon, leaving the daughter at home, whereupon she went to a neighbor, one Miss Sullivan, made complaint of her father's treatment of her, and on departure took from Miss Sullivan a check for $300 and some jewelry. Miss Sullivan signed and swore to a criminal complaint charging Lillian with the theft of this personal property, resulting in the issuance of a warrant and Lillian's arrest the following day. The state alleges that this arrest was in fact a mock proceeding, prearranged between Lillian and Miss Sullivan for the purpose of getting Lillian into the custody of the authorities that she might then with safety to herself lay complaint against her father, as she did, with the dismissal of the proceedings against herself following. Defendant denies all criminality, alleging that his daughter was wayward, headstrong, and hard to manage, and so accounting for his severely punishing her at this time while she was at his home alone with him. He also testified that the reason why she did not accompany his wife on the visit was because of certain conduct and statements made by her to the wife and the knowledge had by both him and the wife of the daughter's conduct at Walla Walla and Portland, from which both decided not to take her with the other children on this visit. The alleged statements of Lillian and her purported conduct causing her to be left at home were offered on trial and excluded, as was the testimony of Mrs. Apley as to grounds for such reason offered for not taking the girl with her.

During her cross-examination, as a part of the state's case, prosecutrix had testified in detail to alleged conduct of the defendant toward her, tending to establish that on June 29th he had brutally maltreated her and related to her previous acts of abuse by him upon her brother Jesse; and that by his general conduct toward her he had so terrorized his daughter as to cause her, through fear of him, to submit to his desires. At this time she claims he beat her face until it was black and blue, accused her of former prostitution, and threatened to kill her, besides talking to her of obscene and indecent matters. In the main this was denied by the defendant, except that he admits he beat her to punish her. His explanation of the matter in this particular is not altogether compatible with his innocence.

On her cross-examination she had admitted having been in charge of the police matron at Walla Walla; that the police matron had taken her

to Portland and told her about a home there, "and told me she was afraid I was pregnant or in the family way." Whereupon cross-examination concerning general unchastity and particular acts of unchastity was prevented, but later in part permitted, to the extent that prosecutrix related, as a reason for the fear of the matron that prosecutrix was pregnant, that she, Lillian, had been guilty of having sexual intercourse with one Henry in 1910; but that she did not know one Barry, but that Barry had come to the jail and offered to bail her out. That she had told her father in Portland, when she was provoked at him, that she would go back to Henry, not Barry. On redirect examination, in response to counsel for the state, she testified: "I am sure that I was never pregnant, because I only had sexual intercourse once, with the exception of the defendant, and that was with George Henry on one night the last day of August, in the city park at Walla Walla; that was the night I went to jail myself. That was the only time I ever had sexual intercourse before coming to Mr. Apley's place."

On July 13th the prosecutrix was examined by a physician, Doctor Savage, who testified to her then physical condition, giving testimony corroborative of prosecutrix that someone had carnally known her at about the time she charges the defendant with such criminal intimacy. After the examination of this witness, and as a part of the defense, prosecutrix was called for further cross-examination, and defendant then sought to establish from her own lips, by cross-examination, "that said witness was acquainted with one Barry, who in 1910 was the keeper of certain rooms in Walla Walla, used for purposes of prostitution; that said witness voluntarily used and occupied, for a period of more than three weeks in the summer of 1910, one of said rooms for the purpose of prostitution, and that during said time she received men not her husband in said room, and voluntarily had sexual intercourse with them for a money consideration." And, further, "that at Portland, Oregon, and on the way from that place to Napoleon, North Dakota, in the month of June, 1911, she, said Lillian Apley, stated to defendant that she had had voluntary sexual intercourse with one George Henry, one Hart, and others at Walla Walla, Washington, in the months of May and June, 1910; and that in the summer of 1910 she was acquainted with one Barry; . . . that said Barry was the keeper of a house of prostitution at Walla Walla in 1910. That said witness for the

space of more than three weeks occupied a room in said house for the purpose of prostitution, voluntarily, and that during said time she frequently had voluntary sexual intercourse with men for a money consideration." The foregoing evidence was offered: "(1) For the bearing it has on the credibility of said witness Lillian Apley; (2) in view of the testimony of the witness Doctor Savage; (3) as bearing on the testimony of this witness when she testifies that she had sexual intercourse with the defendant and that she was hurt thereby; (4) as bearing upon the question of the truth of her statement that she swore to concerning the injury she suffered by reason of the intercourse she testified to; (5) further, as explanatory of the defendant's conduct toward this witness, and explanatory of the treatment the defendant gave the witness, and as explanatory of the punishment he inflicted upon her." The testimony was excluded on the state's objection, being in the main that the same was incompetent, immaterial, and irrelevant, an inquiry into a collateral matter; that none of said facts could be shown as affecting credibility of the prosecutrix, she being under the age of consent; that the testimony of a female prosecuting witness cannot be so attacked by showing specific acts of intercourse; further, that the intercourse sought to be established is too remote; that the testimony is not proper for impeachment purposes; and that no proper foundation had been laid for any such testimony if otherwise admissible.

Under such condition of the record, defendant made offers of proof of the general unchastity of the prosecutrix as to having been an inmate of a house of prostitution; and also as to the further specific acts of unchastity as bearing on the issues involved, credibility of the prosecutrix, her physical condition at the time in question, her motives and desires concerning the larceny of the check and jewelry; also as bearing upon the conduct of the defendant toward her and possibly other phases of the case under consideration. As is usual in cases of this kind the all-important question is one of the credibility of the principal parties, the prosecutrix and the defendant.

Examination of the authorities discloses considerable conflict concerning the admissibility of evidence of the unchastity of a prosecutrix. The cases are many and the opinions inharmonious, and the same is true of texts on evidence. The varying opinions are in part probably due to a difference in the statutory definition of the crime of rape, some

of the statutes in terms placing in issue the previous chastity of the complainant, as for instance the Nebraska statute as construed in Bailey v. State, 57 Neb. 706, 73 Am. St. Rep. 540, 78 N. W. 284, 11 Am. Crim. Rep. 660; again, other holdings are modified by the rule prevailing in the particular jurisdiction as to scope of cross-examination; and other decisions may be explained as based upon various views of procedural policy in the reception or exclusion of such testimony. Hence the latitude of cross-examination generally allowable in this jurisdiction should be considered in this connection. The rule as to cross-examination of witnesses, including a defendant witness, as announced by the decisions of this court, particularly that of State v. Kent (State v. Pancoast) 5 N. D. 516, 35 L.R.A. 518, 67 N. W. 1052, may be said to authorize a liberal cross-examination. Indeed, that case has been held to be an extreme holding in favor of the state on the questions involved of cross-examination concerning credibility and motive. State v. Hazlet, 16 N. D. 426, at pages 439–440, 113 N. W. 374. Consult also Territory v. O'Hare, 1 N. D. 30, 34 N. W. 1003; State v. Rozum, 8 N. D. 548, 80 N. W. 477; State v. Ekanger, 8 N. D. 559, 80 N. W. 482; State v. Malmberg, 14 N. D. 523, 105 N. W. 614; and State v. Hazlett, 14 N. D. 490, 105 N. W. 617, a rape prosecution; and State v. Denny, 17 N. D. 519, at page 527, 117 N. W. 869. We must hold that this state is committed to permitting a liberal and reasonably extended cross-examination upon all matters affecting credibility, both generally and as to the specific case, and as concerns motive, interest, or bias of a witness, whether a defendant or an ordinary witness, and whether the case be civil or criminal. As supporting this conclusion we quote from the syllabus in State v. Kent. "For the purpose of affecting the credibility of a witness it is proper to ask him on cross-examination questions the answers to which may tend to degrade, disgrace, or criminate him." This rule applies to cross-examination of all witnesses, including a defendant. Again, concerning credibility, in State v. Malmberg, 14 N. D. 523, on page 526, 105 N. W. 614, we find: "There is a wide distinction between evidence which affects the general credibility of a witness and evidence which affects the credibility of a witness's testimony in a specific case. Both are proper subjects for cross-examination." And the opinion cites and specifically approves of what is said in Wigmore on Evidence, under the head of "Testimonial Impeachment," vol. 2,

chap. 29, and particularly §§ 879, 943 et seq. It will be noted that Wigmore on Evidence is an authority for the admission of much if not all the testimony here offered. Wigmore, Ev. § 200. In far the greater number of states cross-examination as to specific acts of intercourse, except those had with defendant, is excluded. The only precedent from our court in a case of statutory rape is State v. Hazlett, 14 N. D. 490, at pages 498, 499, 105 N. W. 617, from which we quote: "The prosecutrix is generally, as in this case, the only witness who can give direct testimony as to the facts constituting the crime, and the defendant alone, as in this case, can directly deny those facts. In the nature of things, therefore, the verdict to be given depends almost entirely upon the relative weight and credibility of the conflicting testimony of these two witnesses. This case, therefore, is one which expressly demanded latitude of cross-examination, because that was, to a great extent, the only effective means by which to determine the weight and credibility of the two principal opposing witnesses. It was important that the cross-examination should extend to every fact and circumstance within reasonable limits which might tend to disclose improbabilities or inconsistencies in the witness's narrative of the facts, or which might tend to discredit the witness generally or detract from the weight or credibility of his or her testimony in the particular case by reason of improper influences which might induce him or her to falsify." And on page 499 of the opinion the court further says: "As we explained in State v. Malmberg, supra, cross-examination within reasonable limits as to matters collateral to the issues is always proper if the facts inquired about affect the credibility of the witness."

The cases cited from our own court are, with a single exception, other than rape cases. They are not cited as precedent upon the admission or exclusion of this particular evidence, except in so far as they establish that in this state a liberal cross-examination generally is permitted. Our court is committed to the broad rule of cross-examination, and in passing upon the cross-examination permissible in this particular case we must adopt a rule consistent with the scope of cross-examination usually allowed in this jurisdiction in other cases. The various states fall into three general classifications as to scope of cross-examination permissible in the particular jurisdictions; namely, the narrow or restrictive, the broad or discretionary, and the medium rule, this last de-

pending usually upon a statute governing the scope of cross-examination, as is the case in California, Michigan, Missouri, Oregon, and possibly other states. This was considered in one of the pioneer cases in this state upon the scope of such examination (Territory v. O'Hare, 1 N. D. 30, 44 N. W. 1003), as will be found commented upon at page 45. Our court, with full knowledge of the three rules, chose the one that has since always been followed,—the discretionary rule. In pronouncing upon this particular matter, as to whether a prosecutrix may be cross-examined as to her ever having been an inmate of a house of prostitution, the answer to which in the affirmative would be some evidence of general unchastity, it would be inconsistent and illogical to follow precedent from those states permitting only the most restricted cross-examination, or from states like California, where, in addition to a statute governing cross-examination, we find a statute like § 2051–2 of the California Code, construed by that court also to apply, as will be hereafter shown. When that court has seen fit to place its decisions in parallel cases solely upon its statute, we, having no similar statute, cannot regard such a holding as authority in this jurisdiction. In short, the first duty we owe is to keep the line of our own decisions reasonably consistent and harmonious. Wigmore on Evidence, vol. 2, § 987, but illustrates this in the following words: "The state of the law upon the foregoing topics illustrates the truth (not as often judicially appreciated as it ought to be) that there are half a hundred independent jurisdictions within our boundaries, and that it is impossible to make use of all the rulings as though they were valid precedents for every jurisdiction. The shuttle-cock citation of decisions backward and forward, in and out of their proper jurisdictions, has done much to unsettle and to confuse the law. The greatest judicial service that can be rendered to-day is to keep the line of precedents clear and inflexible in each jurisdiction."

Naturally upon a question upon which courts are so divided, strong argument can be made, favoring either the admission or exclusion of this testimony. For its exclusion it is urged that such cross-examination is humiliating to the prosecutrix, and places in the hands of the defendant too much power when abused; that the jury's attention may be diverted to the trial of such collateral issues; that the female victim will be loath to prosecute, and that in cases such as here before us, where the prose-

cutrix is but a girl, to permit such cross-examination might be almost shocking to one's sense of what ought to be permitted. But after all, it is but the truth that it sought to be elicited by the direct method of cross-examination with the answers to the questions usually conclusive upon the defendant, so there can be no trial of any collateral issue; and any undue and unjustly occasioned humiliation to a prosecutrix but reacts against the defendant in the minds of the jury, to such an extent that prudent counsel, knowing this, seldom ask such questions merely to humiliate; and where the proposed examination is plainly out of place the discretion of the court is ample to control abuses here as elsewhere. So, in the end such objections are more imaginary than real. On the other hand, while no injury can be done a prosecutrix, there may be great danger of a wrongful conviction resulting from the exclusion of such testimony. Concerning this we quote from Wigmore on Evidence, vol. 1, § 200, as follows: "The better view seems to be that which admits the evidence. Between the evil of putting an innocent or perhaps an erring woman's security at the mercy of a villain, and the evil of putting an innocent man's liberty at the mercy of an unscrupulous and revengeful mistress, it is hard to strike a balance. But with regard to the intensity of injustice involved in an erroneous verdict . . . the admission of the evidence seems preferable." And this was said concerning the admission of evidence as to particular acts of unchastity, while the question under consideration concerns only the admissibility of evidence of prostitution evidencing general unchastity.

We deem the best authority favors the admission of the proof concerning her having been such an inmate as constituting proof of general immoral character, thus affecting general credibility. 4 Elliott, Ev. § 3094, and cases cited. We quote from 1 Wharton on Criminal Law, 11th ed. § 695: "At common law, and under statute, in the absence of a specific provision to the contrary, the chastity or want of chastity on the part of the female is immaterial in the commission or the charge of the commission of the crime of rape; . . . but on accusation of the commission of the offense against a woman of unchaste or immoral character her want of chastity may be shown as bearing on the question of consent to the act. In such a case the impeachment of the character of the prosecutrix in this respect must be confined to evidence of her general reputation, except that she may be interrogated as to her previous

acts of intercourse with the accused, or as to her promiscuous intercourse with men, or as to common prostitution. This is the general rule supported by numerous authorities, but in some states it is held otherwise." And the authority has collected scores of cases on the subject. The following is from 10 Enc. Ev. p. 604, subdivs. 4 & 5: "Some courts hold that the defendant may introduce evidence that the prosecutrix had voluntary sexual intercourse with other men prior to the time of the alleged offense; other courts hold to the contrary. As a general rule evidence that the prosecutrix has had sexual intercourse with men other than the defendant prior to the time of the alleged offense is inadmissible if the prosecutrix be under the age of consent; but this has been held otherwise and such evidence admitted for certain purposes." Greenleaf on Evidence, vol. 3, § 214, declares: "The character of the prosecutrix for chastity may also be impeached; but this must be done by general evidence of her reputation in that respect, and not by evidence of particular instances of unchastity. Nor can she be interrogated as to a criminal connection with any other person, except as to her previous intercourse with the prisoner himself; nor is such evidence of other instances admissible." Also from Cyc: "In some states it is held that, on the question of character, specific acts of intercourse with others may be shown, and that the prosecutrix may be compelled to answer on cross-examination as to whether she had intercourse with another at or about or before the time; but according to the weight of authority want of chastity must be shown by general reputation, and not by proof of specific acts, except that individual acts with defendant prior to the alleged crime may be proved as it tends to show consent. Nor are the declarations or admissions of the prosecutrix as to specific acts with others than defendant admissible. But it has been held that general immoral habits and character of the prosecutrix may be shown, as by showing that she was a common prostitute, etc. Specific acts with others than defendant may be shown to rebut corroborating circumstances, as when the woman is pregnant or has miscarried or given birth to a child, or where she was infected with venereal disease, or where a physician has testified that the hymen was ruptured. In cases of carnal knowledge of a female under the age of consent, her want of chastity cannot be shown to show consent, since she is incapable of consenting; but it has been held that want of chastity may be shown as affecting credibility of

the prosecutrix as a witness, although it would not be a defense if the act was admitted, or to show the adulterous disposition of the parties." 33 Cyc. 1479–1482, and numerous cases cited. To the same effect, see Underhill on Criminal Evidence, 2d ed. § 418.

Besides the foregoing authorities, citing numerous cases, see the extensive note to McQuiggan v. Ladd, 14 L.R.A.(N.S.) 689, and particularly pages 714 to 724. This note, however, must be considered in connection with the author's scope note on page 690, expressly stating that it "excludes every attack upon the credibility of one giving testimony in a litigation, either in his own or another's behalf, upon cross-examination by questions designed to elicit admissions of specific misconduct." Otherwise, what is said and the citations given on page 723 of the note under the head "Statutory rape" may be misleading. California decisions since 1872 are hardly authority on this question, because they are holdings under the California statute, §§ 2051–2, construed to exclude the cross-examination of a prosecutrix as to specific acts of unchastity. See People v. Harlan, 133 Cal. 16, 65 Pac. 9, from which we quote: "Nor can the immoral character of a witness or specific acts of immorality be shown by independent evidence for the purpose of impeaching a witness. The Code of Civil Procedure, §§ 2051 and 2052, prescribes the method of impeaching witnesses, and they can be impeached in no way other than therein provided. People v. Johnson, 106 Cal. 289, 39 Pac. 622." For the early holding of the same court, diametrically the contrary and before the enactment of these statutes, see People v. Benson, 6 Cal. 221, 65 Am. Dec. 506. And since this decision California has held both ways on this question. Compare People v. Shea, 125 Cal. 151, 57 Pac. 885, with People v. Benc, 130 Cal. 159, 62 Pac. 404. New York has also held both ways, and the classical opinions on each side of this question are from that state; the first, in 1838, by Judge Cowen in People v. Abbot, 19 Wend. 194, an extreme holding admitting both proof of specific acts of intercourse and general prostitution as affecting credibility and as proof of her general immoral character, and the contrary later holding in 1857, by Judge Strong in People v. Jackson, 3 Park Crim. Rep. 391, excluding independent proof as to specific acts with others than defendant. But the New York rule now admits testimony of general prostitution by cross-examination of prosecutrix or by independent proof. See

Woods v. People, 55 N. Y. 515, 14 Am. Rep. 309. For an extensive note collecting the early authorities, see the note to Smith v. State, 80 Am. Dec. 361 to 375. And for an extended discussion, see Rice on Evidence, §§ 520 et seq.

The proof offered by cross-examination of prosecutrix, as to the prosecutrix a year previously having been an inmate of a house of prostitution, should have been received. It bore upon her general credibility; and the fact that she was under the age of consent, and that consent cannot be in issue, is no sufficient reason why such testimony bearing upon immoral habits and general immorality, and therefore affecting general credibility, should be excluded. In this state the age of consent is by statute fixed at sixteen years, in first degree rape. The logical outcome of the holdings of many courts would exclude cross-examination of a prosecutrix upon such testimony as not affecting her credibility, had she happened to be one day under sixteen years of age at the time of the commission of the alleged crime, while had she been two days older it would have been admissible on her general credibility. We see no reason why the fact of nonage and want of capacity to legally consent should bar such proof of general immorality as might be disclosed, should she on cross-examination admit having been a year previously an inmate of a house of prostitution. This testimony sought under cross-examination should have been admitted. If not otherwise material, her answer would have been conclusive upon the state; hence no collateral issue could be tried. 33 Cyc. 1482, note 83; State v. Rivers, 82 Conn. 454, 74 Atl. 757; Shoemaker v. State, 58 Tex. Crim. Rep. 518, 126 S. W. 887, decided in 1910.

Counsel for the state have briefed upon the theory that the prosecutrix was but the victim of bestiality, a mere girl, in whom to presume prostitution would be little short of preposterous. That she could not be a brazen harlot, and rules of evidence should be applied to accord with her youth. They infer that counsel for defendant made the offers of proof principally to humiliate, and not in good faith, and that the court's discretion exercised in excluding it should not constitute reversible error. It is true that youth usually presupposes inexperience, innocency, chastity, and purity; but a careful perusal of the record convinces us that in prosecutrix the state had, as its right hand in this trial, an apt and very intelligent witness. Some of her replies to the examining

counsel, as well as her testimony upon details related, indicate a breadth of knowledge of matters we may safely presume to not ordinarily be known by young and inexperienced girls. Some of her answers to counsel were very effective, to say the least, and disclose that she thoroughly understood the situation at all times. She admits that at about the time charged as the period of her indiscretion in Walla Walla, the police matron had "told me she was afraid I was pregnant, or in the family way." She also admits having used intoxicating liquors, and on one occasion to such excess that the doctor had to be called for her, but blames this episode upon the woman with whom she was staying. She has been under the charge of the authorities at Walla Walla and at Portland. The letters tendered the court for inspection with the offer of proof, including the offered testimony of the defendant as to what he had learned, abundantly establish the good faith of defendant's counsel in making the somewhat unusual offer. These letters detail circumstances disclosing that the defendant was by no means the first person to suspect or charge the daughter with being, despite her years, considerably experienced in ways she should not have known. As Exhibit 2 is but the reply to one of defendant's first letters, and returning the $30 he had sent for her transportation back to this state, defendant certainly could not be charged with connivance in any of the matters contained in it. It purports to be from the Salvation Army rescue home at Portland. It is the unsolicited statement of one interested in her, to the father. In part it reads:

"I think it best for you, as well as her, to let you know that she is a hard girl to manage; she run away from me and everybody that tries to do well by her, and part of the time nobody knew where she was. . . . Two or three other good homes were offered her, where the people were amply able to do well by her if she would only try to be good and make something of herself, but she just runs away from everybody. . . . They had her in the city jail and kept her there four days. I didn't hear of it till late the next day, and then Mr. Osgood and I went down, and her conduct had been so bad that they wouldn't let her out, and if they had I couldn't have done nothing with her. But either the fore part of that night or the night before, she and a man about thirty-two years old, a low rake, was in the city park. I don't know how long, but she owned up to me and the police that he had accomplished his purpose, and that

wasn't the first time, so you can see what else might be the trouble. I don't say she is in trouble, but there is nothing to hinder her from being. Well, the Salvation Army took hold of the matter, and the police matron of the Salvation Army took her to Portland to what they call 'a rescue home.' It is a good place if she is in trouble, or if she isn't. . . . I can't tell you how bad we all feel about her; there is something good we like about her, but her awful trouble is the men; and she is so fresh and tries to attract every man's attention. I tell you it will take a mighty strong hand and will to finish bringing her up, and I honestly think it would be the ruination of her to let her go back there alone. (Meaning to North Dakota.) Now I was talking to the police matron to-night. I went down to see her. She took me over there, and she is a nice, good woman, and she was about all she could manage on the train, she told me. . . . I hope you will not be offended by anything I have written you, for I can prove it all by dozens."

From the entire record we believe that defendant should have been permitted to cross-examine as to whether in fact she had been an inmate of a house of prostitution along with her other escapades. Though this girl was young, the precedent that will be established must be one that will govern in all similar cases. We see no reason why the youth of the prosecutrix alone excludes such cross-examination. Cross-examination of the prosecutrix concerning former prostitution was not too remote and should have been allowed. A distinction should be drawn between permitting such cross-examination and the cross-examination upon specific acts of unchastity. The former evinces a degree of general depravity, affecting credibility, while, generally speaking, the latter may not.

It is unnecessary to pass upon whether prosecutrix could be cross-examined as to specific acts of intercourse as affecting her general credibility. As a general rule cross-examination cannot be had of a prosecutrix as to specific acts of intercourse with others than defendant. But under the state of this record, after the physician had testified in the state's behalf to the physical condition of the prosecutrix, as he was properly allowed to do as corroborative of the state's theory of the case,—he testifying that the hymen had not only been ruptured but had sluffed away, and that his testimony as to the pain and condition of the girl was "arrived at largely by talking with her,"—that under these

circumstances the cross-examination of the prosecutrix concerning specific acts of intercourse with others should have been permitted to show that such condition might have been brought about by others, and thus, if possible, break the force of the necessary inference cast against defendant by the testimony of the physician. To this extent, and for such purposes, prior acts of intercourse are material as explaining or bearing upon her present physical condition, shown in evidence by the state as corroborating the proof against defendant. Instead, the physician's testimony was left as corroborating prosecutrix, though defendant, by the proposed cross-examination, might have shattered such apparent corroborative testimony. The exclusion of this testimony alone necessitates a reversal of the judgment. People v. Betsinger, 34 N. Y. S. R. 819, 11 N. Y. Supp. 916; Shirwin v. People, 69 Ill. 55, 1 Am. Crim. Rep. 650; Nugent v. State, 18 Ala. 521; People v. Duncan, 104 Mich. 460, 62 N. W. 556; People v. Knight, — Cal. —, 43 Pac. 6; 33 Cyc. 1481; Bader v. State, 57 Tex. Crim. Rep. 293, 122 S. W. 555; Parker v. State, 62 Tex. Crim. Rep. 64, 136 S. W. 453; State v. Mobley, 44 Wash. 549, 87 Pac. 815; State v. Gereke, 74 Kan. 196, 86 Pac. 160, 87 Pac. 759; State v. Height, 117 Iowa, 650, 59 L.R.A. 437, 94 Am. St. Rep. 323–335, 91 N. W. 935; Walker v. State, 8 Okla. Crim. Rep. 125, 126 Pac. 829, and cases therein cited. And this is true in statutory rape as well as in common-law rape. People v. Flaherty, 79 Hun, 48, 29 N. Y. Supp. 641.

And further error appears in the court's refusal to permit Miss Sullivan, a state's witness, to be cross-examined concerning whether at the time she swore to the complaint charging the prosecutrix with grand larceny, she stated anything to the justice of the peace with reference to the talk she claims to have had with Lillian, pursuant to which the claimed fake larceny proceedings against prosecutrix were instituted. Miss Sullivan testified as follows: "I stated under oath on the 7th day of July, 1911, before the justice of the peace, that Lillian Apley did commit the crime of grand larceny;" following which the question was asked: "Now, when you swore to this statement, did you tell Mr. Bryan (justice) anything about this talk you had with Lillian Apley?" (Referring to the prearrangement between witness and Lillian, whereby the arrest of Lillian would be thus obtained.) An objection was urged, and the witness was not permitted to answer. Counsel then asked: "You

replied to my question when I asked you that when this case was tried at Napoleon; did you not so swear that you did not make that statement to Mr. Bryan at the time that you swore to this affidavit with reference to the talk with Lillian concerning this property at the time you signed this affidavit?" Upon objection made, witness was not permitted to answer. Whereupon defendant then offered "to prove by the cross-examination of this witness that when she signed Exhibit 6 (the criminal complaint charging Lillian with grand larceny) she said nothing to the justice of the peace concerning the conversation she alleges to have had with Lillian Apley, the complaining witness, in her house, concerning her property." This was excluded and was error. Such testimony bore directly upon the credibility of the witness. The question of whether the taking of this property by Lillian under circumstances amounting to larceny, and whether upon her arrest upon proceedings instituted in good faith against her, to escape the consequences of which by diverting the attention to the defendant, she caused his arrest and this prosecution, had a very important bearing upon the case under defendant's theory of his defense. Hence, if defendant could establish that Miss Sullivan, the complaining witness against Lillian Apley in the grand larceny charge, said nothing to the justice when she swore to the complaint of what she has in her examination testified were the facts, to wit, that the property was taken by Lillian with her knowledge and under a prearranged plan that she should secure Lillian's arrest in this manner, such an admission might have had considerable weight with the jury by causing them to disregard the testimony of this witness, and also, perhaps, doubt the good faith and motives of the prosecutrix in this prosecution. The testimony offered should have been received.

The defense called the wife of defendant, and by her sought to establish the reasons why Lillian was not taken with the other children on her visit to Minnesota. Defendant offered this testimony for the obvious purpose of preventing the jury from inferring that he kept Lillian at home that he might prostitute her, which might be the fair inference from the testimony of the prosecutrix, and which would harmonize with the state's theory of the case. The witness was allowed to state merely that she was afraid to take her, but was not permitted to state explicit reasons, if she had them, for such fear, nor the purported facts upon which her reasons were based. In this we believe the defense was un-

duly curtailed, as the reasons offered to be established, appearing from the offer of proof made, would have tended to strongly support the testimony of the defendant, and should have been received.

Error is predicated upon the admission of the testimony of Miss Sullivan concerning the fact and details of the complaint made to her by prosecutrix on July 5th, and in describing the girl's then apparent condition. The testimony was proper and was well within the rule announced by State v. Werner, 16 N. D. 83, 112 N. W. 60. Testimony as to apparent physical condition of prosecutrix was also admissible. 10 Enc. Ev. 591; Underhill, Crim. Ev. § 412; 33 Cyc. 1470; Wharton, Crim. Ev. 10th ed. pp. 1529–1556; and for cases see vol. 17 Decen. Dig. § 43, under "Rape."

In view of another trial we will state that the cross-examination of the defendant, permitted over objection, exceeded proper bounds. As an instance, he was permitted to be cross-examined touching matters involved in the death of his first wife, ten years before, as to which the jury may have concluded that her death may have been due in part to his refusal to call a doctor for her during or shortly after she had given birth to a child; and as to his calling his first wife, ten years dead, and her relatives, sports. All or the greater portion of such testimony may have been prejudicial to the defendant, and was without the issues involved in determining his guilt or innocence. While the limits of cross-examination permissible in this state are in the sound judicial discretion of the trial court, we believe this testimony should have been excluded. In justice to the trial court we will here state that the prosecutrix, in her testimony concerning the occurrences between the 29th of June, 1911, and the 5th day of July following, related alleged statements made by the defendant to her concerning events occurring during her mother's lifetime and down to that time, to support which testimony the state cross-examined the defendant on matters covering that entire period. We cannot see how such matters concerning his first wife and defendant's acts referred to could have been relevant or admissible. We do not say that we would reverse this case on the cross-examination alone, but we do believe too great latitude was permitted counsel for the state in that examination.

We cannot feel that the same results would necessarily have followed had the errors in the exclusion and admission of testimony pointed out

not taken place. The fact that the jury were three days and nights deliberating upon this case before they reached the verdict of guilty, while not controlling, is a circumstance we will also consider in this connection.

The judgment of conviction appealed from is therefore ordered set aside, and the case remanded for new trial or further proceedings according to law.

BURKE, J. (dissenting). The foregoing opinion does not meet with my approval, for two reasons: First, I do not believe the opinion is correct when it states that the cross-examination relative to the girl's unchastity and immoral character was admissible as affecting her credibility as a witness; second, I believe under the facts in this case that such testimony was not material to any issue on trial, and therefore not admissible upon that ground. Defendant stands convicted of the crime of rape upon a girl under the age of consent. Our statute makes it a crime to carnally know a female under the age of sixteen, whether she has been of previous chaste character or not. The prosecutrix was a witness for the state, and upon cross-examination was asked regarding specific illicit acts of sexual indulgence, and whether or not at a period some thirteen months prior to the alleged offense she had for three weeks been an inmate of a house of prostitution. Upon this question being excluded, and at various other times through the trial, defendant offered the said proof as a matter of defense. This offer was denied, and the appeal raises the two questions; namely, first, was such question proper cross-examination as affecting the credibility of the witness; and, second, was such evidence material to the issues on trial, so that it might be admitted in proof as a matter of defense whether the prosecutrix had been a witness or not?

As stated in the majority opinion, the defendant presented his offer of such question upon five grounds. However, the first ground relates to the credibility of the witness, and the other four to the relevancy of the testimony, so there are in effect but two questions involved. It is important, however, to keep in mind the distinction between the offers as affecting the credibility of the witness, and the other four offers which are based upon the theory that the evidence is material. For, if the evidence is admissible upon the first theory, the question

may be asked of the prosecutrix alone, and her answer is conclusive; while, if asked upon the second theory, that it is material to some issue involved in the trial, the answer of the girl is not conclusive, but other witnesses may be called to testify to the matter even though the prosecutrix herself were not a witness in the case. This distinction is important in cases wherein the prosecutrix does not take the witness stand, which situation in cases of statutory rape is not only possible, but altogether likely. In the case at bar the distinction will become apparent if upon a new trial, the prosecutrix, as is altogether probable, states that she was not such inmate, and the defendant offers other evidence to contradict her. If the evidence is admissible solely as affecting her credibility, such contradictory evidence will not be admissible. Also, it is possible that the prosecutrix in this case might die, become insane, or leave the jurisdiction of the court before the next trial, and the state should proceed to trial, either without her testimony, or by using that given at the last trial. I emphasize this distinction, because I believe that it is the failure to observe it that has confused the majority of this court. After reading practically every case upon the subject contained in our library, I have reached the conclusion that there is no case in the United States directly holding that the evidence of a girl's unchastity is admissible upon the theory that it affects her credibility alone; the nearest to such a holding being the Connecticut case to which I shall refer later,—while practically every other court that has touched upon the subject holds to the contrary. The defendant in his brief, and this court in the majority opinion, state that the strongest reason for the admissibility of the testimony in this case is that it affects the credibility of the witness Lillian, and as such was proper cross-examination. I therefore feel justified in taking a little time to review the authorities cited in the majority opinion. The first case and the principal one upon which they rely for such holding is State v. Kent (State v. Pancoast) 5 N. D. 516, 35 L.R.A. 518, 67 N. W. 1052. The syllabus in that case has misled many a lawyer and some trial judges, as well as text writers. The Kent Case when carefully read is exactly contrary to the holding of the majority of this court in the case at bar. Mr. Kent was cross-examined regarding transactions had by him some twenty years previous with an Ohio bank. It was claimed that such testimony was admissible upon two grounds:

First, to affect the credibility of the witness; and, second, upon the theory that such evidence was material to the issues on trial. In this respect it was similar to the case at bar. This court approved the questions upon the theory that they were material, and expressly excluded them upon the ground that they affected the credibility of the witness. I quote from the opinion in such case at page 551: "Having held that this cross-examination was proper for the purpose of showing motive, we might here leave this branch of the case, but the question of the propriety of such examination as affecting the credibility of the witness is squarely upon the record. . . . We shall therefore proceed to state without elaboration our views upon the point . . . (page 556), but there are reasons why we think this cross-examination improper as affecting the credibility of the witness." Then follow several pages of reasons, and at page 558: "But, as this evidence was all properly admitted for the purpose of showing motive, it is elementary that the judgment cannot be disturbed because it was inadmissible for another purpose." It is thus perfectly plain that the Kent Case is not an authority for the admission of this evidence as affecting the girl's credibility. The Kent Case in this respect is a great deal like most of the cases cited in the majority opinion. The apparent conflict of authorities mentioned in the opinion is readily explained when the cases are carefully read with the above distinction in mind. Take the state of New York, for instance. There is no conflict in the decisions of that court. The case of Woods v. People, 55 N. Y. 515, 14 Am. Rep. 309, which is cited in the majority opinion as an authority for the admission of the testimony as affecting the credibility of the witness, is not a holding upon that proposition at all. I quote from the opinion in that case: The evidence is received upon the issue "whether he ravished her by force, or whether she assented to such intercourse. . . . The evidence is received upon this ground, and not for the purpose of impeaching the general credibility of the witness." The same is true of the other New York case cited, People v. Abbot, 19 Wend. 194, from which also I quote: "In such a case the material issue is on the willingness or reluctance of the prosecutrix, . . . any fact tending to the inference that there was not the utmost reluctance, and the utmost resistance is always received." The same explanation is to be made in the California cases. The case of People v. Benson,

6 Cal. 222, 65 Am. Dec. 506, which is cited in the majority opinion as supporting the admission of similar testimony to affect the credibility of the witness, does not in any manner support the opinion. The evidence in that case was not admitted to affect the credibility of the witness, but "as tending to disprove the allegation of force and total absence of resistance on her part." It happened that the prosecutrix was a child of thirteen years, but California at that time (1856) had only the common law or force rape, and the indictment had to allege and did allege that force was used. The same condition obtained in the case of People v. Shea, 125 Cal. 151, 57 Pac. 885, which merely follows the Benson Case. The credibility of the witness was not mentioned, but they quote: "This class of evidence is admissible for the purpose of tending to show the improbability of resistance upon the part of the prosecutrix."

It is true that at 33 Cyc. pp. 1481, 1482, note 83, a single clause of a sentence may be extracted which says that the want of chastity may be shown as affecting the credibility of the prosecutrix, but by reading the cases cited in note 83 in said volume of Cyc., and in the 1913 Cyc. Ann. thereto, we find the cases all to the effect as hereinafter stated. I have taken the trouble to digest the seven cases cited in the said Cyc. text with the following result:

State v. Duffey, 128 Mo. 549, 31 S. W. 98. In this case there is such a statement used in the opinion, but it was not in any manner material in the case, and was the merest *dictum*.

State v. Rivers, 82 Conn. 454, 34 Atl. 757. This case comes the nearest to supporting the text of any in the United States. However, they state that the acts of unchastity may be inquired into if they tend to show that the witness was unreliable, but "the extent of such inquiries is, however, largely a matter of discretion, and their exclusion by the trial court in the exercise of that discretion is rarely considered a sufficient ground for granting a new trial."

Shoemaker v. State, 58 Tex. Crim. Rep. 518, 126 S. W. 887. In this case it was claimed that the prosecutrix had threatened the arrest of the defendant when she was caught in a compromising position with another man. The evidence was not offered to affect her general credibility, but to show her bias as a witness, and the act of unchastity shown went merely to show the occasion of the threat.

Parker v. State, 62 Tex. Crim. Rep. 64, 136 S. W. 453. In this case the prosecutrix had given birth to a child about nine months after the alleged rape. The court held that it was material to show intercourse with other men at about the time of the conception of the child, as it tended to explain this corroborating circumstance.

Wade v. State, — Tex. Crim. Rep. —, 144 S. W. 246. In this case the defendant moved for a continuance upon the ground that at the next term of court he could produce a witness who would testify to the bad character of the prosecutrix. The court held that this was not grounds for a continuance.

State v. Workman, 66 Wash. 292, 119 Pac. 751. In this case the ruling was under the Washington statute which makes it a crime to carnally know a girl under sixteen years of age, if she has been of *previous chaste character.* Of course under such a statute the chastity of the girl would be a material issue on the trial.

Richardson v. State, 100 Miss. 514, 56 So. 454. In this case the state had proven that the hymen of the prosecutrix had been ruptured. It was held material to show that the rupture might have been caused by other intercourse. It will thus be seen that what the majority opinion calls "citing perhaps hundreds of cases" has dwindled down to practically the Connecticut case alone. On the other hand, the opinions cited as contrary are squarely to the point, and stand for the exclusion of the testimony, unless it is material to some issue on trial. In the case of Marshall v. Territory, 2 Okla. Crim. Rep. 136, 101 Pac. 139, the court has gone into the matter very fully. I would advise any person seeking light upon this interesting question to read the *résumé* of the cases found therein. Next taking up the case of Walker v. State, 8 Okla. Crim. Rep. 125, 126 Pac. 829, and the case of People v. West, 106 Cal. 89, 39 Pac. 207, the correct side of the question is pretty lucidly presented. See also Plunkett v. State, 72 Ark. 409, 82 S. W. 845; People v. Abbott, 97 Mich. 486, 37 Am. St. Rep. 360, 56 N. W. 862; State v. Gleim, 17 Mont. 17, 31 L.R.A. 294, 52 Am. St. Rep. 655, 41 Pac. 998, 10 Am. Crim. Rep. 46; State v. Roderick, 14 L.R.A. (N.S.) 704, and especially the note at page 723. See also cases cited at 697 to 706, note 14 L.R.A.(N.S.)

In the case of People v. Glover, 71 Mich. 303, 38 N. W. 874, the following language is used: "The defendant offered to introduce tes-

timony showing that the reputation . . . [of the prosecutrix] for chastity was bad. . . . The defendant also offered testimony showing specific acts of lewdness on the part of . . . [the prosecutrix]. . . . This testimony, on motion of the prosecuting attorney, was excluded. . . . Error is alleged upon the refusal of the court to allow defendant to show that the reputation of the girl for chastity was bad. The good or bad character of the girl for chastity was not in issue. The prosecution was had under the statute of 1887, which fixes the age of consent at fourteen years; and, the girl being too young to consent to the intercourse, it would be no answer that she had a bad reputation for chastity." In the case of People v. Johnson, 106 Cal. 289, 39 Pac. 622, "the defendant offered to prove the general reputation of the prosecutrix for unchastity. . . . The present case is an exception to the general rule. The prosecuting witness is under the age of consent, and for this reason evidence either of general reputation or specific acts would seem to be immaterial. This class of evidence is admissible for the purpose of tending to show the nonprobability of resistance upon the part of the prosecutrix. . . . In other words, this class of evidence goes to the question of consent only, and in a case like the present the question of consent is not involved. . . . If this class of evidence was admissible as going to the credibility of the testimony of the prosecutrix in its entirety, then it would be equally admissible as against the veracity of any female who might be called upon to give evidence in a case. Yet no such principle is recognized anywhere."

In the case of Hall v. State, 43 Tex. Crim. Rep. 479, 66 S. W. 783, it is said: "It is not permissible to impeach any witness for truth and veracity by showing that his or her reputation for chastity is not good. . . ."

In the case of Plunkett v. State, 72 Ark. 409, 82 S. W. 845, it is said: "The character of the prosecutrix for chastity is not involved in a charge of this kind, as in cases of seduction. The only question in a charge of this kind is whether appellant had sexual intercourse with the prosecutrix. The *et tu* defense does not obtain. The prosecutrix on cross-examination testified broadly that she had never had sexual intercourse with anyone except appellant; and appellant contends that he should have been permitted to show that she had sexual intercourse

with another, to contradict and impeach her. But here, again, such impeachment would have been upon an immaterial point, which is not allowed when brought out for the first time upon cross-examination."

In People v. Abbott, 97 Mich. 484, 37 Am. St. Rep. 360, 56 N. W. 862, it is said: "The offense is in unlawfully and carnally knowing a female child under the age of fourteen years, and it is no less an offense within the terms of the statute if the child has had intercourse with other men prior to that time. The court was not in error in excluding the evidence. But though the court did exclude at the time it was first offered, evidence of this character, it was afterwards admitted, and respondent's counsel drew from the girl the fact that at other times prior to the alleged offense she had had intercourse with several other men. The court admitted this testimony on the claim of counsel for respondent that it was competent as bearing upon the girl's credibility. It was not competent in this case even for that purpose. If the girl had been of the age of consent, it might be competent to admit evidence of her general reputation for chastity as bearing upon the probability of her story. . . . But here the law conclusively presumes that the girl could not give her consent. . . . Her reputation for truth and veracity could be inquired into, the same as of an adult, but she could not be impeached by her acts of intercourse." In the case of State v. Gleim, 17 Mont. 17, 31 L.R.A. 294, 52 Am. St. Rep. 655, 41 Pac. 998, 10 Am. Crim. Rep. 46, it is said: "Upon the trial the counsel for the state on the cross-examination of the appellant propounded a great many questions calculated to degrade the defendant before the jury. The inquiry took a wide and varied range. She was asked if she had not rented houses for purposes of prostitution at various places in Montana; whether she had not been 'a kind of a backer for the prostitution of female persons in Missoula and Hamilton;' whether she had not had a fight with a priest; whether she had not hugged and kissed a juryman after she had been found not guilty of some misdemeanor upon one occasion; whether she had not had a fight with a French prostitute at some time, etc. We cannot conceive upon what theory of the law this line of testimony was allowed. It was not cross-examination of what appears by the record to have been the appellant's evidence in chief, nor did it legitimately tend to impair the credibility of the defendant as a witness. Its effect must have

been highly injurious and prejudicial to the defendant in the minds of the jury. . . . Such an examination we most earnestly disapprove of. It was oppressive and unjust no matter how wicked or degraded the defendant may have been by common report."

In State v. Whitesell, 142 Mo. 467, 44 S. W. 332, it is said: "As evidence of unchastity on the part of prosecutrix goes to the question of consent, it is immaterial in a prosecution for having carnal knowledge of a girl under the age of consent, for in such a case want of consent to the act is not essential."

In Walker v. State, 8 Okla. Crim. Rep. 125, 126 Pac. 829, it is said: "In the form the question was asked the evident purpose was to show a lack of chastity, and thus impeach the prosecutrix. Evidence tending to show a lack of chastity on the part of the prosecutrix is only admissible to raise the presumption of consent, and, this being a case of statutory rape, that issue was not in the case."

In State v. Ogden, 39 Or. 195, 65 Pac. 449, it is said: "The rule is well settled that on the trial of a party charged with the commission of rape it is competent for him to impugn the virtue of the prosecutrix if she is of statutory age, not with a view of justifying or even excusing his conduct, but for the purpose of showing that her general reputation for chastity is bad, thereby creating a presumption that the act of which she complains was consummated with her consent, and not by force. . . . If the prosecutrix has attained the legal age . . . her character may be challenged, for the same reason, by inquiring of her on cross-examination whether she has ever had illicit sexual intercourse with the accused at any time prior to the act. . . . Evidence of such previous connection being admissible to give rise to a presumption that she consented to the act in question. . . . In those respects the law is uniform."

In the case of Peters v. State, 103 Ark. 119, 146 S. W. 491 (year 1912), it is said: "If . . . the defendant had offered to show that such statements were false, it would involve for the determination of the jury another and entirely different issue."

In State v. Hilberg, 22 Utah, 27, 61 Pac. 215, it is said: "The prosecutrix was under the age of consent. Sexual intercourse with her constituted an offense under the statute, whether she consented or not. Her good or bad character for chastity, as affecting the crime charged

against the defendant was not in issue, although her general reputation for truth and veracity was. The testimony offered was incompetent. So, specific acts of unchastity on the part of the young woman were not admissible."

In the case of State v. Eberline, 47 Kan. 155, 27 Pac. 839, it is said: "It is insisted that it was competent for the defendant to prove the general reputation of the prosecutrix for chastity and virtue, not as a justification or an excuse for the crime, but for the purpose of affecting her evidence. We do not so understand the rule. While evidence of a witness's bad character for veracity is admissible, inquiry in such a case as this must be confined to the witness's character for truth and veracity."

In the case of State v. Rash, 27 S. D. 185, 130 N. W. 91, Ann. Cas. 1913 D, 656, we quote: "It is further contended by the appellant that the court erred in not permitting him to prove, as discrediting the testimony of the medical experts, or as rebutting the same, that the said Edna Roberts had been an inmate of a house of ill fame. . . . We are of the opinion that the evidence offered . . . was properly excluded."

In State v. Blackburn, — Iowa, —, 110 N. W. 275, it is said: "It appears from the record that the question was treated by the court as calling for the character of the prosecutrix, including her character for chastity as known to the witness. . . . It seems to us, therefore, that there was no prejudicial error in sustaining the objection to the question."

In the case of State v. Hobgood, 46 La. Ann. 855, 15 So. 406, it is said: "It is inadmissible, in order to attack veracity, to prove the bad character of the female witness for chastity, or to show that she is a prostitute."

In the case of Birmingham Union R. Co. v. Hale, 90 Ala. 8, 24 Am. St. Rep. 748, 8 So. 142, 2 Am. Neg. Cas. 52, it is said: "Notwithstanding such extension of the rule, immoral conduct in any one particular, however it may bear on the question of general character, cannot be put in evidence for this purpose. By a notorious want of chastity, a female will certainly obtain a bad character, and her general reputation, if she has acquired any, may be given in evidence to impeach her; but not the particular and independent fact that she is a

prostitute, or keeps a house of ill fame,—the cause producing her bad character cannot be inquired into."

In People v. Chin Hane, 108 Cal. 597, 41 Pac. 697, it is said: "The witness Ah Wah testified that she was the wife of the deceased. . . . The defense attempted to prove that she had been an inmate of a house of prostitution. The evidence was inadmissible. Such matters are entirely collateral, and her veracity could not be impeached in that way."

In the case of Jackson ex dem. Boyd v. Lewis, 13 Johns. 504, it is said: "There can be no doubt that the evidence offered to impeach the character of Catherine Bassett was inadmissible. It would not be competent to prove that she was now a public prostitute, and much less to inquire whether she was so in her younger days; the inquiry should have been as to her character for truth and veracity."

In Com. v. Churchill, 11 Met. 538, 45 Am. Dec. 229, it is said: "This case presents the direct question whether evidence is admissible to impeach the credibility of a female witness, which tends to show that she is, and for sometime has been, a common prostitute. . . . The only reported case in which it has been held that such evidence is admissible is Com. v. Murphy, 14 Mass. 388. It was a decision made in the course of a capital trial, and probably without much time for deliberation or reference to authorities. . . . We consider it as a deviation from the established rule of the common law on the subject. It has been regarded by judges of this commonwealth with disapprobation, and has not been adopted by the courts of other states. . . . It is not required by any strong considerations of fitness or expediency, and cannot be regarded as having acquired the force of a settled rule of law. We are, therefore, of opinion that the decision of the judge in rejecting the evidence was correct."

In the case of State v. Fournier, 68 Vt. 262, 35 Atl. 178, it is said: "For the purpose of impeaching the state witnesses . . . the respondent offered to show that prior to their marriage Fanny kept a house of ill fame, the witness Howe lived in it, knew its character, and acted in its behalf; that subsequently Fanny was held to bail upon a charge of keeping the house, forfeited her bonds, and paid them. This offer was for the purpose of a general impeachment of the witnesses. The test of impeachment is, What is the character or general reputation of the witness for truth and veracity? and this rule has been universally

adhered to in this state. It has been held incompetent upon that question to show that a witness was a common prostitute."

In Morse v. Pineo, 4 Vt. 281, it is said: "There is no way to ascertain how far the reputation of a prostitute affects her truth, but by proving her character for truth."

See also interesting note with cases cited at page 481 of volume 53 Am. St. Rep., from which I quote: "Under the rule that no particular act of immorality is sufficient to impeach the credibility of a witness, it has been held in many cases that testimony to show that the witness either was or had been a common prostitute is inadmissible for the purpose of impeaching her credibility."

At 14 L.R.A.(N.S.) 723, the text writer says: "The foregoing discussion has abundantly shown that in trials for the common-law crime of rape the character for chastity of the alleged victim is material solely for its bearing upon the question whether force against her utmost resistance was used to deflower her, or whether she consented to the accomplishment of the lustful purpose.

"In the case of statutory rape, consent is no element in the crime; the victim by reason of her tender years is legally incapable of consenting to her defilement. The question of her chastity is therefore entirely immaterial, and the courts are virtually unanimous in excluding all evidence relating to it." Citing the cases above mentioned and State v. Anthony, 6 Idaho, 386, 55 Pac. 884; State v. Blackburn, — Iowa, —, 110 N. W. 275; People v. Glover, 71 Mich. 303, 38 N. W. 874; State v. Whitesell, 142 Mo. 467, 44 S. W. 332; State v. Hilberg, 22 Utah, 27, 61 Pac. 215. Those opinions give the reasons for the holding that the matter is collateral; that the jury should not be diverted from the main issue to try the subordinate one, as the girl seldom or never will admit prostitution; that it is manifestly unfair to propound such a question to a witness, especially one of tender years, when it is always or nearly always impossible to refute the imputation which the question carries; that while it is easy to say that a prostitute is not entitled to belief, it must be remembered, however, that prostitutes seldom have men arrested for rape, and that practically all of the questions will be asked of respectable girls. It is hard enough now to get young girls who have been debauched to testify against their betrayers, and police matrons and rescue workers generally assert that for each

girl who makes complaint there are many hundreds who bear their wrongs in silence, rather than submit to the publicity their complaint would bring upon them. But if this rule is allowed to stand, it means not only the prosecutrix in rape cases, but every witness of every kind, in civil cases, as well as criminal, may be asked this disgraceful question for the sole purpose of testing her credibility, and such evidence must be received, regardless of the discretion of the trial court who may want to protect her.

In addition to the cases cited the following are more or less in point, and sustain this holding:

State v. Eberline, 47 Kan. 155, 27 Pac. 839; Peters v. State, 103 Ark. 119, 146 S. W. 491; State v. Rush, 27 S. D. 185, 130 N. W. 91, Ann. Cas. 1913D, 656; Stayton v. State, 32 Tex. Crim. Rep. 33, 22 S. W. 38; McCray v. State, 38 Tex. Crim. Rep. 609, 44 S. W. 170; Woodward v. State, 42 Tex. Crim. Rep. 188, 58 S. W. 144; McAfee v. State, 17 Tex. App. 139; Conway v. State, 33 Tex. Crim. Rep. 327, 26 S. W. 401; Lancaster v. State, 36 Tex. Crim. Rep. 16, 35 S. W. 165; Butler v. State, 34 Ark. 480; Strang v. People, 24 Mich. 6; People v. Un Dong, 106 Cal. 83, 39 Pac. 12; People v. Glover, 71 Mich. 303, 38 N. W. 874; People v. Abbott, 97 Mich. 484, 37 Am. St. Rep. 360, 56 N. W. 862; Boddie v. State, 52 Ala. 395; McQuirk v. State, 84 Ala. 435, 5 Am. St. Rep. 381, 4 So. 775; Shartzer v. State, 63 Md. 149, 52 Am. Rep. 501; Pleasant v. State, 15 Ark. 624; Wilson v. State, 16 Ind. 392; State v. Jefferson, 28 N. C. (6 Ired. L.) 305; State v. Ward, 73 Iowa, 532, 35 N. W. 617; Camp v. State, 3 Ga. 417; Com. v. Regan, 105 Mass. 593; Com. v. Harris, 131 Mass. 336; People v. McLean, 71 Mich. 309, 15 Am. St. Rep. 263, 38 N. W. 917; State v. White, 35 Mo. 500; State v. Forshner, 43 N. H. 89, 80 Am. Dec. 132; State v. Knapp, 45 N. H. 148; State v. Campbell, 20 Nev. 122, 17 Pac. 620; McCombs v. State, 8 Ohio St. 643; Pefferling v. State, 40 Tex. 486; Dorsey v. State, 1 Tex. App. 33; Rogers v. State, 1 Tex. App. 187; Jenkins v. State, 1 Tex. App. 346; Mayo v. State, 7 Tex. App. 342; Lawson v. State, 17 Tex. App. 299; Fry v. Com. 82 Va. 334; Adams v. State, 93 Ark. 260, 137 Am. St. Rep. 87, 124 S. W. 766; McArthur v. State, 59 Ark. 431, 27 S. W. 628; O'Beenis v. State, 47 N. J. L. 279; State v. Froelick, 70 Iowa, 213, 30 N. W. 487; State v. Egan, 59 Iowa,

636, 13 N. W. 730; State v. Haupt, 126 Iowa, 152, 101 N. W. 739; State v. Seevers, 108 Iowa, 738, 78 N. W. 705; Kilburn v. Mullen, 22 Iowa, 498; State v. Smith, 18 S. D. 341, 100 N. W. 740; 1 McClain, Crim. Law, § 460; 1 Wharton, Ev. § 599; 3 Am. & Eng. Enc. Law, 117, and cases cited; 1 Greenl. Ev. § 463; Underhill, Crim. Ev. § 418; State v. Jackson, 44 La. Ann. 160, 10 So. 600; Re James, 124 Cal. 653, 57 Pac. 578, 1008; Moore v. State, 68 Ala. 360; Gifford v. People, 87 Ill. 211; Cunningham v. State, 65 Ind. 377; Bessette v. State, 101 Ind. 85; State v. Barrett, 40 Minn. 65, 41 N. W. 459; Holbrook v. Dow, 12 Gray, 357.

In the case at bar, we can apply the most radical rule in the United States, namely, the one announced in the Connecticut case, that the trial court has a wide discretion in the admission of such testimony, and his discretion should not be disturbed except for abuse. Under this holding this court should not reverse this case. Let us review the facts briefly.

The girl's mother had died when she was an infant. Her father had abandoned her to an orphan asylum, from which she had been taken by a woman who later wrote the letter regarding her which was in the possession of the trial court. When taken to the state of Washington by this family, she was a mere child, and was between twelve and thirteen at the time that defendant claimed she had been an inmate of a house of prostitution. The girl on her direct examination had positively sworn that she had had sexual intercourse with but one other man in her lifetime, which was virtually an answer to the question sought to be asked of her. If asked for the sole purpose of affecting her credibility, her answer was conclusive, and could not be contradicted, as she had already denied the accusation, in effect. I cannot see the error in the exclusion of the question. The trial court had before it the letter written by the chief of police of the town of Walla Walla, Washington, relative to this girl, as well as the letters from the foster mother and the matron of the Salvation Army there. Those letters were the principal basis of defendant's claim of good faith in asking the said questions. I will quote briefly from the letter from the chief of police: "Speaking plainly I will say that your daughter's conduct and the manner in which she conducted herself prior to the time of her arrest was not of the best, in fact she was thought to be

without a home or anyone to look after her, and for that reason she was picked up by the police, and the matter brought to the attention of the prosecuting attorney, who, after looking into the matter, decided that she should be sent to the reform school, but the police matron brought her influence to bear and the Salvation Army stepped in and agreed to provide her with a home. . . . " The woman at whose home the girl was staying writes as follows: "Regarding your daughter Lillian, my sister took her to raise, . . . she came to visit me this summer and brought her with her and left her with me. . . . She is a little hard to manage, and I think it proper for her father to take charge of her. . . . She is a bright, smart girl . . . she was always nice when here, but we could not trust her out of sight, and were just as anxious about her as if she had been our own flesh and blood, until she ran away and was put in jail." Under these circumstances we think it was a case where the trial court should be allowed to say whether the questions were asked more to humiliate and embarrass the witness than to legitimately affect her credibility. To be sure the letters do not reflect any great credit upon the girl, and in a measure at least justified the defendant in his offer, but the said letters do not go to the extent of claiming that the girl had ever been an inmate of a house of prostitution. Also the trial court considered the evidence of Dr. Savage, that she appeared to be unused to sexual intercourse. As the trial court has exercised his discretion for the exclusion of the question, I think that his judgment should be respected.

So far in this discourse I have confined my remarks on the admissibility of the testimony as to the girl's prior chastity to the sole purpose of affecting her credibility. I am satisfied that any person who will take the time to read all of the cases that I have mentioned will reach the conclusion that I have reached; namely, that such evidence should not be admitted for the purpose alone of impeachment, and that the cases of the country, with the possible exception of the Connecticut case, are unanimously in accord with this statement. Thus in the case at bar, the witness could not be asked whether or not she had been an inmate of a house of ill fame unless that fact was material to the issues on trial. It is in the discussion of this feature of the cases that the cases cited by the majority opinion became relevant. I

will agree that the great weight of authority favors the admission of any fact, no matter how distasteful to the girl, that tends to show the guilt or innocence of the defendant. Even a prostitute has the protection of the law to protect her person, and it is no defense to the charge of rape to say that the girl was unchaste. If the testimony becomes material for any of the reasons which will be hereafter discussed, the defendant may prove her unchastity as a matter of defense not only by cross-examination of the prosecutrix, but by the testimony of other witnesses. In all cases of rape, where it is claimed that force has been used, such evidence becomes material as showing the probability that the girl did not resist, because it is not likely that a woman who has frequently sold her person for money will resist an attack upon her honor, and it is not likely that a man who could have purchased the embraces of the woman would force her. This is the holding of practically all of the cases that have been cited in the majority opinion, as holding the evidence admissible as affecting the credibility of the girl. However, in this case it must be remembered that the time of an unchastity of the girl must not be too remote. It would not be material, for instance, to show that a married woman who had lived a respectable married life for twenty years, had been a prostitute prior to her marriage. Nor would it be material that the girl had become a prostitute after the alleged offense, nor would it be material to show acts of sexual intercourse with a single favored lover, as that would raise no presumption that she had consented to the embraces of the defendant, who might be distasteful to her. This fact was emphasized in one case wherein the prosecutrix was a white girl and the defendant a negro, the court saying that the fact that she had yielded her person to the embraces of her lover raised no presumption whatever that she did not resist the defendant, who was colored. Also in those cases where the state seeks to corroborate the testimony of the prosecutrix by showing that she became pregnant or had contracted a venereal disease from which the defendant was known to suffer, or was shown to be suffering from lacerations, the defendant in those cases might show in explanation that the girl with the said disease had been an inmate of a house of prostitution at about the time she contracted the same, and that the pregnant girl had intercourse with other men at about the time of the conception, or that the lacerated girl had

intercourse with another man at about the time she was lacerated, but it would not be material to show that the girl with fresh lacerations had intercourse thirteen months prior to the alleged offense, nor would it be permissible to show that the pregnant girl had intercourse with a man two years before the conception of the child. Those are matters of the application of common sense to the facts of each particular case on trial. As stated in the majority opinion, in addition to offering the evidence as affecting the credibility of the prosecutrix, the defendant offered such evidence upon matters which he claimed made it material in the cause. The first offer was to explain the testimony of Dr. Savage. I will agree that under certain circumstances this evidence might have been received for this purpose, but in view of the evidence of Dr. Savage itself it was not admissible. The offense is alleged to have occurred about the 1st of July, 1911. The doctor examined the girl about the 13th of July, 1911, some twelve days later, and he testifies that "I found her nervous, and there was a tenderness over the sides of the lips of the vagina. It was sore and raw, and she was lacerated and abrased. . . . In my opinion there had been sexual intercourse with the girl who had not been in the habit of having it. . . . In my opinion it was seven to fourteen days before." The offer to prove that she had been an inmate of a house of prostitution in June, 1910, thirteen months previous, was in no manner an explanation of the injuries to which the doctor testified. On the contrary, it would seem that they were entirely inconsistent with such injuries. If the girl were the prostitute that the question seemed to imply, intercourse would not likely have left her raw and lacerated, as the doctor testified that he found her. Such evidence will be more in the nature of a contradiction than an explanation of Dr. Savage's testimony. The same reasonings apply to the offer of the defendant to show that she had been a prostitute, to contradict her testimony when she said that the defendant had hurt her. Such testimony would not explain in any manner the fact, if it were a fact that she was hurt. It contradicted it, and it is a well-known principle that the evidence, if received at all, must be admitted for the purpose of explaining some inference of guilt which arises against the defendant, and not in contradicting the evidence. The same reasons apply to the offer of such testimony to explain the conduct of the defendant.

The testimony was not material for that purpose. The defendant was not on trial for his general conduct, but for rape. The fact that the girl had been an inmate of a house of prostitution in no manner whatever threw any light upon whether or not she had been carnally known by this defendant, and was entirely immaterial. I have shown, first, that such testimony could not be received as affecting her credibility, unless it was material to some issue on trial in the case; secondly, I have shown, I think, that it was properly excluded by the trial court, and I cannot assent to the majority opinion, which lays down the rule that it not only should be received as affecting the credibility of the girl, whether material or not, but that in this particular case, it was material. However, the merits of this individual case, although important to the parties concerned, are not nearly so important as the announcement of such a vicious rule as this court is about to announce when it says that such a question may be asked, whether it is material or not, and that the trial court has no discretion to exclude it. The evils of such a rule are so many that I have done everything that I can to prevent its enunciation by this court, and file this opinion now as a protest against its adoption.

THE STATE OF NORTH DAKOTA v. JAMES J. REILLY.

(141 N. W. 720.)

Information — murder — miscarriage — statute — crime — charging offense.

1. Information examined, and *held* to sufficiently state the offense of murder in the second degree under §§ 8789, 8796, and 8912, Rev. Codes, accomplished by the unintentional killing of a human being while engaged in the procurement of a miscarriage which was not necessary to save the life of the deceased.

Trial judge — jury — regular panel — discharge — excuse jurors — talesmen — discretion — good cause.

2. A trial judge has no right to arbitrarily discharge a regular jury panel without cause, and summon another, for the trial of a particular case. He may, however, for reasons which, in the exercise of his discretion, he deems sufficient,

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Note.—As to the competency of medical experts to give testimony on medical questions, see note in 66 Am. Dec. 235.

excuse jurors who have been summoned, although such action may necessitate the resort to talesmen or the summoning of an additional jury, and even though his reasons therefor are not such as would constitute a legal ground for the disqualification or exemption of such jurors.

Jury — failing to appear — attachments — trial — impaneling jury.

3. Where a panel has been properly summoned, but only a portion thereof appears at the trial, it is not necessary for the court to delay the impaneling of such jury or to postpone the trial, nor is it necessary for him to summon other jurors or to issue attachments for the absent jurors before proceeding with the impaneling of those who have appeared.

Evidence — objection — "incompetent, irrelevant, and immaterial" — foundation — opinion — hypothetical questions.

4. An objection that a question is "incompetent, irrelevant, and immaterial, no foundation laid and an improper question—improper to ask for the opinion of the doctor," does not sufficiently raise an objection that some of the witnesses on whose testimony the hypothetical question is based gave their own opinions in addition to reciting the facts of their observation.

Evidence — medical expert — usage — questions — particular profession.

5. The question: "Doctor, when another physician is called in a serious case, what is the custom of the first physician, what does he usually do? Tell him everything he knows about the case?" is not vulnerable to the objection that it is incompetent, irrelevant, and immaterial, no foundation laid, and not in any way binding upon the defendant. If there is a general usage applicable to a particular profession or business, parties who engage an individual in that profession are supposed to deal with him according to the usage, and the fact that there may be a local usage which is different from the general custom is not suggested by the objection.

Witnesses — medical expert — medical knowledge — abortions — self-inflicted.

6. Where a witness is allowed to testify fully on cross-examination to the fact as to whether a particular wound upon the uterus could have been inflicted by the deceased herself, it is not error to sustain an objection to a further question propounded upon such cross-examination as to whether it is not a fact within medical knowledge that intentional abortions are often performed by the use of needles, knitting needles, lead pencils, or other instruments.

Evidence — repetition — cumulative — objection — error.

7. Where matters are not in dispute, and are repeatedly testified to and fully conceded by the witnesses for the state, it is not necessarily reversible error in a criminal case to exclude questions which are merely cumulative and in affirmance of that which the state's witnesses freely admit.

Cross-examination — extent of — court — discretion.

8. The extent of cross-examination is within the sound discretion of the court.

Physician — expert testimony — medical college — graduate — qualifications — proof of.

9. It is not necessary that a person should be a graduate of a medical college or duly licensed to practise, in order that he may give testimony as an expert medical witness, where the witness testified that he was a physician and surgeon, had practised for eighteen years, and treated all kinds of ailments, sicknesses, and performed surgical work, as his qualification to so testify was sufficiently proved.

Instructions — nonprejudicial — error.

10. Various instructions examined, and, although not approved, *held* not to be prejudicial or to constitute reversible error.

Instructions — witness — testifying falsely — disregard — corroboration.

11. An instruction to the effect that "if any witness has been shown to have wilfully and knowingly testified falsely in regard to some material matter, you are at liberty to disregard his testimony entirely, unless corroborated by credible testimony," *held* to be a sufficiently definite statement of the law upon the subject.

Instructions — jury — charge of court — exceptions — waiver.

12. The trial judge said: "The court at this time will submit to the jury a written charge, but owing to the fact that there is but one counsel for the defense, and that his time has been thoroughly taken up during the progress of the trial so that he has not had proper and sufficient time to consider the charge in order to file his written exceptions thereto, which he would be required to do before the charge was given, the court will permit the defendant to consider the charge the same as if it had been delivered orally, and save to him his right to file exceptions thereto the same as if it were an oral charge." *Held:* that under §§ 9987, 9988, and 10078, Rev. Codes 1905, such exceptions were required by the order to be filed within twenty days, and that unless such exceptions were so filed the right thereto was waived. (Fisk, J., dissenting.)

Evidence — sufficiency.

13. Evidence examined, and *held* to sustain the verdict.

New trial — newly discovered evidence — cumulative — refusal — error.

14. It is not error to refuse to grant a new trial on the ground of newly discovered evidence where the evidence discovered is merely cumulative, and does not tend to make "a doubtful case clear."

New trial — refusal — notice of intention — motion — assignments of error.

15. The refusal of a new trial cannot be assigned as error where, as a matter of fact, no motion for the same was made or presented, but merely a notice served of an intention so to move. The same is true of assignments of error which relate merely to the sufficiency of the evidence.

On rehearing.

Evidence — expert testimony — basis of.

16. An expert may give an opinion based on the testimony of other witnesses that he has heard, in case there is no material conflict in the facts testified to by such other testimony.

Oral charge — failure to file exceptions — curing omission.

17. Although under §§ 9987, 9988, and 10078, Rev. Codes 1905, exceptions to an oral charge are required to be filed within twenty days, and unless so filed the right thereto will be waived, the omission will be deemed to have been cured where the record discloses that the court allowed an extension of time to settle the case on condition that exceptions to his charge be filed within a time limited, and that subsequently to such time the said court certified as a true and correct statement of the case, a statement which included the exceptions in question.

Opinion filed March 21, 1913. Affirmed on rehearing May 20, 1913.

Appeal from the District Court for Cavalier County, *Hon. A. G. Burr,* J., sitting by request.

Defendant was convicted of the crime of murder in the second degree, and appeals.

Affirmed.

E. R. Sinkler and *J. A. Heder,* for appellant.

The information in this case is defective, in that it contains mere recitals, instead of positive and direct allegations of fact, and defendant's demurrer should have been sustained. State v. Trueblood, 25 Ind. App. 437, 57 N. E. 975; Bassett v. State, 41 Ind. 303; State v. McIntyre, 19 Minn. 93, Gil. 65; State v. Belyea, 9 N. D. 353, 83 N. W. 1.

The burden of proof was upon the state to show that the abortion or miscarriage was not necessary. The state requires such negative fact to be set out, and the state has the burden of supporting it. People v. Balkwell, 143 Cal. 259, 76 Pac. 1017; State v. Lee, 69 Conn. 186, 37 Atl. 75; State v. Magnell, 3 Penn. (Del.) 307, 51 Atl. 606; Howard v. People, 185 Ill. 552, 57 N. E. 441; Diehl v. State, 157 Ind. 549, 62 N. E. 51; State v. Aiken, 109 Iowa, 643, 80 N. W. 1073; State v. Watson, 30 Kan. 281, 1 Pac. 770; Dixon v. State, 46 Neb. 298, 64 N. W. 961; State v. Clements, 15 Or. 237, 14 Pac. 410; Hatchard v. State, 79 Wis. 357, 48 N. W. 380.

The evidence in this case, instead of showing the non-necessity of the operation, clearly shows that an operation was necessary to the preservation of life. State v. Wells, 35 Utah, 400, 136 Am. St. Rep. 1059, 100 Pac. 681, 19 Ann. Cas. 631; 1 Enc. Ev. 56; 4 Elliott, Ev. 2771; Bishop, Statutory Crimes, 762.

An expert witness cannot give his opinion based upon the testimony of witnesses he has heard, without assuming such testimony to be true. Barber's Appeal, 63 Conn. 393, 22 L.R.A. 90, 27 Atl. 973; Louisville, N. A. & C. R. Co. v. Falvey, 104 Ind. 409, 3 N. E. 389, 4 N. E. 908; Stoddard v. Winchester, 157 Mass. 567, 32 N. E. 948; Elliott v. Russell, 92 Ind. 526; Chicago, R. I. & P. R. Co. v. Moffitt, 75 Ill. 524; Burns v. Barenfield, 84 Ind. 43; McCarthy v. Boston Duck Co. 165 Mass. 165, 42 N. E. 568; Getchell v. Hill, 21 Minn. 464; State v. Lautenschlager, 22 Minn. 514; Jones v. Chicago, St. P. M. & O. R. Co. 43 Minn. 279, 45 N. W. 444; Carpenter v. Blake, 2 Lans. 206; Link v. Sheldon, 136 N. Y. 1, 32 N. E. 696; Armendaiz v. Stillman, 67 Tex. 458, 3 S. W. 678; Luning v. State, 2 Pinney (Wis.) 215, 52 Am. Dec. 153; Henry v. Hall, 13 Ill. App. 343; Rush v. Megee, 36 Ind. 69; Woodbury v. Obear, 7 Gray, 467; Reed v. State, 62 Miss. 405; Reynolds v. Robinson, 64 N. Y. 589; Hagadorn v. Connecticut Mut. L. Ins. Co. 22 Hun, 249; Gregory v. New York, L. E. & W. R. Co. 55 Hun, 303, 8 N. Y. Supp. 525; Re Snelling, 136 N. Y. 515, 32 N. E. 1006; Gottlieb v. Hartman, 3 Colo. 53; Elgin, A. & S. Traction Co. v. Wilson, 217 Ill. 47, 75 N. E. 436, 19 Am. Neg. Rep. 145; Keyes-Marshall Bros. Livery Co. v. St. Louis & H. R. Co. 105 Mo. App. 556, 80 S. W. 53; Bedford Belt R. Co. v. Palmer, 16 Ind. App. 17, 44 N. E. 686; Crozier v. Minneapolis Street R. Co. 106 Minn. 77, 118 N. W. 256; Williams v. State, 64 Md. 384, 1 Atl. 887, 5 Am. Crim. Rep. 512; People v. Millard, 53 Mich. 63, 18 N. W. 562; State v. Scott, 41 Minn. 365, 43 N. W. 62; People v. McElvaine, 121 N. Y. 250, 18 Am. St. Rep. 820, 24 N. E. 465; State v. Bowman, 78 N. C. 509; State v. Coleman, 20 S. C. 441; Bennett v. State, 57 Wis. 69, 46 Am. Rep. 26, 14 N. W. 912; People v. Vanderhoof, 71 Mich. 158, 39 N. W. 28; People v. Aikin, 66 Mich. 460, 11 Am. St. Rep. 512, 33 N. W. 828, 7 Am. Crim. Rep. 345; State v. Maier, 36 W. Va. 757, 15 S. E. 991; 17 Cyc. 253.

The question of how the abortion or miscarriage was caused, was in

dispute, and was a question for the jury, and it was error to admit the testimony of medical expert witnesses as to their opinion, based upon other evidence not assumed to be true. The question, "Did the doctor tell you the history of the case?" is entirely improper, and affords no foundation for opinion evidence, since it calls for a mere conclusion. State v. Moeller, 20 N. D. 114, 126 N. W. 568.

The charge of the court should be free from intimating any opinion as to the weight of the evidence, or as to what has been proven. State v. Barry, 11 N. D. 428, 92 N. W. 809; People v. Williams, 17 Cal. 142; State v. Whitney, 7 Or. 386; Benedict v. State, 14 Wis. 424; Snyder v. State, 59 Ind. 105; State v. Bige, 112 Iowa, 433, 84 N. W. 518; People v. Cowgill, 93 Cal. 596, 29 Pac. 228; Stokes v. People, 53 N. Y. 164, 13 Am. Rep. 492; McKenna v. People, 81 N. Y. 360; People v. Johnson, 106 Cal. 289, 39 Pac. 622.

In charging the jury the court has no right to assume or state that a "crime has been committed." People v. Casey, 65 Cal. 260, 3 Pac. 874, 5 Am. Crim. Rep. 318; People v. Gordon, 88 Cal. 422, 26 Pac. 502; Brown v. State, 72 Miss. 997, 17 So. 278; Pettus v. State, 58 Tex. Crim. Rep. 546, 137 Am. St. Rep. 978, 126 S. W. 868; Collins v. State, 13 Fla. 651; Bond v. People, 39 Ill. 26; Newton v. State, — Miss. — , 12 So. 560; State v. Porter, 74 Iowa, 623, 38 N. W. 514; Chapman v. State, 109 Ga. 157, 34 S. E. 369; Stephens v. State, 118 Ga. 762, 45 S. E. 619; Santee v. State, — Tex. Crim. Rep. — , 37 S. W. 436; Reese v. State, 44 Tex Crim. Rep. 34, 68 S. W. 283; Reese v. State, — Tex. Crim. Rep. —, 70 S. W. 424; Cortez v. State, — Tex. Crim. Rep. — , 74 S. W. 907; Cavaness v. State, 45 Tex. Crim. Rep. 209, 74 S. W. 908; McCleary v. State, 57 Tex. Crim. Rep. 139, 122 S. W. 26.

The charge of the court violates every presumption of innocence, and of reasonable doubt. State v. Denny, 17 N. D. 519, 117 N. W. 869.

The intent of the defendant to commit the crime charged is one of the essential ingredients of the crime, and should be established by the state, beyond a reasonable doubt. The defendant is not required to prove its absence. The *state* must prove its *presence*. People v. Ribolsi, 89 Cal. 492, 26 Pac. 1082; Ogletree v. State, 28 Ala. 693; Rogers v. Com. 96 Ky. 24, 27 S. W. 813; State v. Schaefer, 35 Mont. 217, 88 Pac. 792; Thomas v. State, 57 Tex. Crim. Rep. 452,

125 S. W. 35; Com. v. Greene, 227 Pa. 86, 136 Am. St. Rep. 867, 75 Atl. 1024; State v. Pilling, 53 Wash. 464, 132 Am. St. Rep. 1080, 102 Pac. 230; People v. Mize, 80 Cal. 41, 22 Pac. 80.

The charge of the court, in effect, places the burden of proof upon the defendant to show that he had no intent to procure an abortion, or that it was necessary to preserve life. People v. Ribolsi, 89 Cal. 492, 26 Pac. 1082; People v. Gordon, 88 Cal. 422, 26 Pac. 502; People v. Mize, 80 Cal. 41, 22 Pac. 80; People v. Rodrigo, 69 Cal. 601, 11 Pac. 481, 8 Am. Crim. Rep. 53.

In such cases the defendant is not required to prove the necessity of the abortion to save life. The burden is upon the state to prove the contrary beyond a reasonable doubt. State v. Wells, 35 Utah, 400, 136 Am. St. Rep. 1059, 100 Pac. 683, 19 Ann. Cas. 631; 1 Cyc. 181; State v. Longstreth, 19 N. D. 268, 121 N. W. 1114, Ann Cas. 1912D, 1317; People v. Balkwell, 143 Cal. 259, 76 Pac. 1017; State v. Lee, 69 Conn. 186, 37 Atl. 75; State v. Magnell, 3 Penn. (Del.) 307, 51 Atl. 606; Howard v. People, 185 Ill. 552, 57 N. E. 441; Diehl v. State, 157 Ind. 549, 62 N. E. 51; State v. Aiken, 109 Iowa, 643, 80 N. W. 1073; State v. Watson, 30 Kan. 281, 1 Pac. 770; Dixon v. State, 46 Neb. 298, 64 N. W. 961.

The charge of the court that the jury could wholly disregard the testimony of any witness who had wilfully and knowingly testified falsely, "unless corroborated by other creditable testimony," was error, because the phrase, "unless corroborated by the facts and circumstances proven on the trial," was omitted.

Such words constitute an essential part of the qualified exception. F. Dohmen Co. v. Niagara F. Ins. Co. 96 Wis. 38, 71 N. W. 69; Mercer v. Wright, 3 Wis. 645; Morely v. Dunbar, 24 Wis. 185; Allen v. Murray, 87 Wis. 41, 57 N. W. 979; Hillman v. Schwenk, 68 Mich. 293, 36 N. W. 77; Blotcky Bros. v. Caplan, 91 Iowa, 352, 59 N. W. 204; State v. Musgrave, 43 W. Va. 672, 28 S. E. 813.

A new trial may be granted on the ground of newly discovered evidence, even though the evidence is cumulative. Hart v. Brainerd, 68 Conn. 50, 35 Atl. 776; Anderson v. State, 43 Conn. 514, 21 Am. Rep. 669; Keet v. Mason, 167 Mass. 154, 45 N. E. 81; Preston v. Otey, 88 Va. 491, 14 S. E. 88; Ellis v. Ginsburg, 163 Mass. 143, 39 N. E. 800; Kochel v. Bartlett, 88 Ind. 237; Mercer v. King, 19 Ky. L. Rep. 781,

42 S. W. 106; State v. Stowe, 3 Wash. 206, 14 L.R.A. 609, 28 Pac. 337; Smythe v. State, 17 Tex. App. 244; Lawson v. State, 13 Tex. App. 264; Tyler v. State, 13 Tex. App. 205; Pinckord v. State, 13 Tex. App. 468.

Andrew Miller, Attorney General, and *W. P. Costello,* Assistant Attorney General, and *G. Grimson,* State's Attorney, Cavalier County, for respondent.

The demurrer interposed by the defendant is too general and indefinite, in that no special defect is alleged which might have been cured by seasonable objection. State v. Longstreth, 19 N. D. 279, 121 N. W. 1114, Ann. Cas. 1912D, 1317.

Courts are entitled to have all objections specifically pointed out. People v. Hill, 3 Utah, 334, 3 Pac. 75; Flohr v. Territory, 14 Okla. 477, 78 Pac. 565; Rev. Codes 1905, Section 8912; Penal Code 1877, Section 377; Rev. Codes 1899, Section 7177; Bassett v. State, 41 Ind. 303; State v. Belyea, 9 N. D. 353, 83 N. W. 1. Distinguished.

The matter of the insufficiency of the evidence is not properly raised in the supreme court, unless first raised and argued in the district court, to afford that court an opportunity to consider and pass upon such question. State v. Empting, 21 N. D. 128, 128 N. W. 1119; State v. Albertson, 20 N. D. 512, 128 N. W. 1122.

The objection and exception to evidence must be specific. 8 Enc. Pl. & Pr. 217–223.

The particular point of the objections must be stated and specified. Tanderup v. Hansen, 8 S. D. 375, 66 N. W. 1073; Rush v. French, 1 Ariz. 123, 25 Pac. 816; F. Mayer Boot & Shoe Co. v. Ferguson, 19 N. D. 496, 126 N. W. 110; Buchanan v. Minneapolis Threshing Mach. Co. 17 N. D. 343, 116 N. W. 335; First Nat. Bank v. Warner, 17 N. D. 76, 114 N. W. 1085, 17 Ann. Cas. 213.

The objection to evidence, that it is incompetent, irrelevant, and immaterial, is bad, if the objection is one that might have been remedied. 3 Enc. Pl. & Pr. 223; 9 Enc. Ev. 58; Tanderup v. Hansen, 8 S. D. 375, 66 N. W. 1073; McQueen v. Bank of Edgemont, 20 S. D. 378, 107 N. W. 208; Davis v. Holy Terror Min. Co. 20 S. D. 399, 107 N. W. 374; Louisville, N. A. & C. R. Co. v. Falvey, 104 Ind. 409, 3 N. E. 389, 4 N. E. 908.

The same principle is applied also to hypothetical questions. 9 Enc. Ev. 90–92, 103, 105; Prosser v. Montana C. R. Co. 17 Mont. 372, 30 L.R.A. 814, 43 Pac. 81; United Oil Co. v. Roseberry, 30 Colo. 177, 69 Pac. 588; People v. Willson, 109 N. Y. 345, 16 N. E. 540; Howland v. Oakland Consol. Street R. Co. 110 Cal. 513, 42 Pac. 983; Wilson v. Harnette, 32 Colo. 172, 75 Pac. 395; Chicago, R. I. & P. R. Co. v. Archer, 46 Neb. 907, 65 N. W. 1043; Reeves v. Chicago, M. & St. P. R. Co. 24 S. D. 84, 123 N. W. 498; State v. Kammel, 23 S. D. 465, 122 N. W. 420; Stahl v. Duluth, 71 Minn. 341, 74 N. W. 143; Colton Land & W. Co. v. Swartz, 99 Cal. 284, 33 Pac. 878; People v. Frigerio, 107 Cal. 151, 40 Pac. 107; Rush v. French, 1 Ariz. 124, 25 Pac. 816.

The defective form of questions should be cured by changing the form, rather than by waiting to bring error in the higher court. Fraser v. Jennison, 42 Mich. 206, 3 N. W. 882; McFall v. Smith, 32 Ill. App. 468; 8 Enc. Pl. & Pr. 762–764; 5 Enc. Ev. 619.

Where there is no conflict over the material facts, an expert may be asked his opinion as based upon the testimony of other witnesses heard by him. Rogers, Expert Testimony, 2d ed. 71; Olmsted v. Gere, 100 Pa. 127; 1 Greenl. Ev. p. 440; Dexter v. Hall, 15 Wall. 9, 21 L. ed. 73; Page v. State, 61 Ala. 16; Pidcock v. Potter, 68 Pa. 342, 8 Am. Rep. 181; Bishop v. Spining, 38 Ind. 143; State v. Klinger, 46 Mo. 224; Carpenter v. Blake, 2 Lans. 206; Coyle v. Com. 104 Pa. 117, 4 Am. Crim. Rep. 379; State v. Privitt, 175 Mo. 207, 75 S. W. 462; Reg. v. Higginson, 47 Eng. C. L. 149, and note.

Where the material facts are not disputed, the question becomes one of science only. 5 Enc. Ev. 612; Scurlock v. Boone, 142 Iowa, 580, 120 N. W. 313; Dexter v. Hall, 15 Wall. 9, 21 L. ed. 73; Olmsted v. Gere, 100 Pa. 127; State v. Privitt, 175 Mo. 207, 75 S. W. 462; Reeves v. Chicago, M. & St. P. R. Co. 24 S. D. 84, 123 N. W. 498; Stahl v. Duluth, 71 Minn. 341, 74 N. W. 143.

In the trial of a suit, if error is committed in admitting incompetent testimony, it is cured by proving the same facts by other competent testimony. State v. Smith, 115 La. 801, 40 So. 171; People v. Lee Dick Lung, 129 Cal. 491, 62 Pac. 71; State v. Rapp, 142 Mo. 443, 44 S. W. 270; State v. Woodward, 182 Mo. 391, 103 Am. St. Rep. 646, 81 S. W. 857; State v. Allen, 94 Mo. App. 508, 69 S. W. 604; Wood-

ruff v. State, 72 Neb. 815, 101 N. W. 1114; State v. Robinson, 126 Iowa, 69, 101 N. W. 634; State v. Schmidt, 34 Kan. 399, 8 Pac. 867; Steageld v. State, 24 Tex. App. 207, 5 S. W. 853; State v. Ford, 3 Strobh. L. 517, note; State v. Merriman, 34 S. C. 619, 12 S. E. 619; Jinks v. State, 35 Tex. Crim. Rep. 365, 33 S. W. 868.

General usage need not be shown. If there is a general usage applicable to a particular profession or trade, parties employing an individual in that profession are supposed to deal with him according to that usage. 12 Cyc. 1044, and cases cited.

Upon the questions as to the practice of women to inflict injury upon themselves in attempts to produce abortions, if it was error to sustain objections to such questions, it was error without prejudice. People v. Fong Ah Sing, 70 Cal. 8, 11 Pac. 323; Territory v. Collins, 6 Dak. 234, 50 N. W. 122; State v. Smith, 8 S. D. 547, 67 N. W. 619.

The intent and scope of cross-examination is within the sound discretion of the court. State v. Foster, 14 N. D. 561, 105 N. W. 938; State v. Longstreth, 19 N. D. 279, 121 N. W. 1114, Ann. Cas. 1912D, 1317; 8 Enc. Pl. & Pr. 109, and cases cited.

In the absence of statutory provision, it is not necessary that physicians or surgeons be graduated from a medical college, or have a license to practise, in order to render them competent to testify as experts regarding matters in connection with their profession. Rogers, Expert Testimony; New Orleans, J. & G. N. R. Co. v. Allbritton, 38 Miss. 242, 75 Am. Dec. 98; State v. Speaks, 94 N. C. 874.

The weight of such evidence is left to the jury. 17 Cyc. 39, 260; Ft. Wayne v. Coombs, 107 Ind. 75, 57 Am. Rep. 82, 7 N. E. 743; Ardesco Oil Co. v. Gilson, 63 Pa. 146, 10 Mor. Min. Rep. 669; 8 Enc. Pl. & Pr. 239–240.

The objections and exceptions to the court's charge to the jury were not timely made and filed, and therefore cannot be considered. The charge of the court should be real and construed as a whole. Buchanan v. Minneapolis Threshing Mach. Co. 17 N. D. 343, 116 N. W. 335; McBride v. Wallace, 17 N. D. 495, 117 N. W. 857; Gagnier v. Fargo, 12 N. D. 219, 96 N. W. 841; Territory v. Taylor, 1 Dak. 479; State v. Denny, 17 N. D. 519, 117 N. W. 869; People v. Doyell, 48 Cal. 85; State v. Finlayson, 22 N. D. 233, 133 N. W. 298.

Where the jury are told that they are the sole and exclusive judges of

the weight of the testimony, it follows that they are told that they are such judges of all questions of fact. State v. Winney, 21 N. D. 72, 128 N. W. 680.

Neither can counsel complain of an instruction requested by himself. Pierce v. Millay, 62 Ill. 133; Weller v. Hawes, 49 Iowa, 45; Campbell v. Ormsby, 65 Iowa, 518, 22 N. W. 656; Smith v. Sioux City & P. R. Co. 38 Iowa, 173.

In cases like the one at bar, the jury having found that an unlawful, principal act was done, it was not necessary to show any intent. Belt v. Spaulding, 17 Or. 130, 20 Pac. 827; People v. Abbott, 116 Mich. 263, 74 N. W. 529, 11 Am. Crim. Rep. 4; Smith v. State, 33 Me. 48, 54 Am. Dec. 607.

In cases like this, the burden is upon the defendant to show the necessity of an operation done to save the life of the person. State v. Lee, 69 Conn. 186, 37 Atl. 75; 1 Cyc. 188; State v. Schuerman, 70 Mo. App. 518; People v. McGonegal, 136 N. Y. 62, 32 N. E. 616; 4 Elliott, Ev. 2771; Bradford v. People, 20 Hun, 309; Moody v. State, 17 Ohio St. 110.

The court's announcement of the rule applying to witnesses who wilfully and knowingly testify falsely is correct. State v. Winney, 21 N. D. 72, 128 N. W. 680.

Defendant is limited in the supreme court to objections and exceptions taken below. State v. Campbell, 7 N. D. 58, 72 N. W. 935.

Errors in charging the jury, or in refusing to charge, should not be considered as reversible error, where it is plain that the issue has been fairly tried and presented to the jury. Standard Oil Co. v. Brown, 218 U. S. 84, 54 L. ed. 945, 30 Sup. Ct. 669; Press Pub. Co. v. Monteith, 103 C. C. A. 502, 180 Fed. 357; State v. Oscar, 52 N. C. (7 Jones, L.) 305.

BRUCE, J. The defendant was convicted of the crime of murder in the second degree. The crime, as charged, was the unintentional killing of a human being while engaged in the commission of a felony; that is, the procurement of an abortion. The defendant has appealed from the judgment.

The first assignment of error related to the demurrer interposed to the information, which was overruled by the court. The information,

omitting the formal parts, reads as follows: "That heretofore, to wit, on or about the 9th day of February, A. D. 1911, at the county of Cavalier, state of North Dakota, one James J. Reilly, late of the county of Cavalier, and state of North Dakota, did commit the crime of murder in the second degree, committed as follows; to wit: That at the village of Milton, county of Cavalier, state of North Dakota, on or about the 9th day of February, A. D. 1911, in and upon the body of one Lillian Drury, a human being then and there being, the said James J. Reilly did unlawfully, wilfully, and feloniously, and without any design to effect the death of the said Lillian Drury, commit an assault with some instrument or other means to this informant unknown, and the said James J. Reilly did then and there unlawfully, wilfully, and feloniously, and without the design to effect the death of the said Lillian Drury, use and employ, insert and thrust, the said instrument and other means aforesaid upon and into the womb of said Lillian Drury, who, at that time and place was a woman pregnant with child, with the intent then and thereby to produce and procure the miscarriage of the said Lillian Drury, the same not then and there being necessary to preserve the life of the said Lillian Drury, and the said James J. Reilly did then and there, by the means and in the manner aforesaid, inflict in and upon the body of the said Lillian Drury, a mortal wound of which said mortal wound the said Lillian Drury did, on the 20th day of February, A. D. 1911, at the village of Milton, county of Cavalier, state of North Dakota, die." The crime is charged in the language of the statute. See § 8912, Rev. Codes 1905, and we believe that the information is not vulnerable to a demurrer. All that the Code requires of informations is that they shall contain "a statement of the acts constituting the offense in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended." Rev. Codes 1905, § 9848. It would, we believe, be absurd to contend that a person of ordinary understanding would not understand the meaning and intent of this information. The word "same," it appears to us, must relate to the word "miscarriage." State v. Quinn, 2 Penn. (Del.) 339, 45 Atl. 544. We realize, of course, that there is a statement in the case of State v. Belvea, 9 N. D. 353, 361, 83 N. W. 1, which may seem to suggest a contrary view to that taken by us. This statement, however, hardly rises even

to the dignity of a *dictum*. It was a declaration merely, and was expressly stated to be outside of the opinion. So, too, our attention has been called to the case of Bassett v. State, 41 Ind. 303. In that case, however, the information stated that "the employment *of said instrument* not being necessary to preserve the life of the woman," without alleging that the miscarriage was not necessary to save the life of the woman. The allegations in the two cases are not, to our minds, at all similar.

Appellant's second point relates to the jury. The record shows that on the 9th day of June, 1911, an order was made by the Honorable W. J. Kneeshaw, directing the summoning of a petit jury of thirty-six men to serve for the adjourned term of the district court convening on June 19th; that such jurors were selected, and that thirty-three of them appeared on June 19, 1911; that of said thirty-three jurors one was excused for the term, and all of the balance remained until the 21st day of June, 1911, at which time one more was excused, and the balance of thirty-one remained and served as jurors until the 24th day of June, when the court was duly adjourned to meet on the 5th of July; that on the 24th day of June and prior to the adjournment, and in the absence of the defendant and his counsel, and without the consent of defendant or his counsel, the district judge peremptorily excused from further service as jurors for the term sixteen of said panel, leaving only fifteen men of the original panel to serve; "that in order to complete the panel, on the 24th day of June, the said judge made an order for a petit jury of thirty-six additional men to complete the panel, said jurors being required to be present at the term of the court to be held on the 6th day of July; that pursuant to such order, a meeting of the county board was called, and thirty-six additional men were selected; that during all of this time the action was pending in the court for trial; that prior to such time, and on the first day of said adjourned term, to wit, on the 19th day of June, the defendant had filed an affidavit of prejudice against the Honorable W. J. Kneeshaw; that the civil and criminal business noticed for trial at said term was disposed of by the court on or before June 24th, and that at said time the adjournment to the 5th day of July was taken; that the sole purpose of the adjournment from June 24th to July 5th was for the trial of said action against said Reilly, and to give an opportunity for the Honorable

A. G. Burr to sit and act as presiding judge in the place of the Honorable W. J. Kneeshaw. The record further shows that when, on the 24th day of June, the Honorable W. J. Kneeshaw made the order for the thirty-six additional men, one W. L. Drury was the sheriff of Cavalier county, and one G. A. Trumbull was his deputy, but no notice of the meeting of the board to select said jurymen was served upon them, and said parties were denied permission to participate as members of the board, the clerk summoning and allowing one S. G. Gibson, the coroner of said county, to act in their place. It was also shown, however, that the said W. L. Drury was the father-in-law of the deceased woman, and also that the said S. G. Gibson had officiated at the inquest upon the body of the said deceased, and was a witness on behalf of the prosecution on the preliminary hearing. It was also shown that the defendant had been a resident of Milton village for many years, and that of the sixteen jurors first excused, six lived in the vicinity of Milton. On a challenge being made by the defendant to this panel and a demand being also made for an attachment to resummon the said sixteen jurors discharged on June 24th, the court granted the said challenge and discharged the panel, finding, among other things, that the order for the new panel was made after the affidavit of prejudice against the Honorable W. J. Kneeshaw had been filed; that no notice was served upon the sheriff to attend and serve, and that the coroner was the same person who had made the complaint. He then ordered that a sufficient number of persons possessing the qualifications of jurors should be summoned from the body of the county for the purpose of completing the number required for a jury in the particular case. To this order the defendant excepted for the reasons that "a competent jury was drawn on June 13, 1911, for the trial of all cases to be tried at the term of the court commencing on June 9th, and to which said term the present session was an adjourned term; that the defendant had a right to select a jury for the trial of the action primarily from the panel so regularly drawn on June 13th, and that the action of the court in vacating the entire panel so drawn on June 13th was unwarranted in law." Before the talesmen so summoned were sworn, the defendant challenged the new panel "on the ground and for the reason that the panel now before the court is composed and made up of four members of the original panel heretofore cited to appear and drawn on June 13,

1911, and that the balance of said panel now before the court is made up of jurors drawn as heretofore set forth in the drawing of jurors on June 27, 1911, and that the panel as now composed is made up of the identical persons who were summoned and selected on June 13th and 27th, as heretofore set forth in defendant's challenge to the panel, and that by reason of such facts the relation of defendant to said panel is not changed," and requested the court to resummon the sixteen jurors of the panel drawn on June 19, 1911, and dismissed by the Honorable W. J. Kneeshaw. This challenge was made individually and collectively. It was granted, and the court then entered an order directing the clerk to convene the jury board for the purpose of drawing thirty-five additional jurors for the trial of the cause. On the court reconvening, the defendant again interposed a new challenge to the effect that "at this time, no juror having yet been sworn, the defendant challenges the panel of thirty-six men now before the court, being the panel selected on July 8, 1911, on the ground and for the reason stated in the previous objection to the order of the court that said panel be selected, and on the further ground that the regular panel of the jurors drawn for the term of court to commence on the 19th day of June, 1911, has not been examined or exhausted, and that the defendant has the right that said panel so drawn on June 13, 1911, be examined as to their qualifications as jurors in this case and exhausted before a new panel shall be called for the trial of this action, and that sixteen of said original panel were unlawfully excused by the court as set forth in the previous objection made to this panel by the defendant; and that said court has refused to recall the said sixteen jurors, and, on the contrary, did excuse the whole of said panel." This challenge was disallowed. The defendant then objected to the calling and examination of the jurors, for the reason that only thirteen out of the panel of thirty-five summoned were present. This objection was also overruled.

The objections of counsel for the defendant are not well taken. It is to be remembered that he himself was, throughout, the challenging party, and that in every case except the last his challenge was allowed. If the challenge on July 6th had been made by the state, and not by himself, there might have been some force in the objection, but this was not the fact. His challenge of that date, it is to be remembered, was to the entire panel. It is true that he offered an amendment to this

challenge, requesting the court to resummon the sixteen jurors of the panel drawn on June 9th, who, he claims, were arbitrarily and unlawfully dismissed by Judge Kneeshaw on June 24th; but we are fully satisfied that he had no right to the resummoning of these jurors. It is well settled "that the court may, for reasons which, in the exercise of its discretion it deems sufficient, excuse jurors who have been summoned, from serving, although such action may necessitate the resort to talesmen or additional jurors to complete the panel. . . . The court may, in the exercise of its discretion, excuse jurors for reasons which constitute no legal ground of disqualification or exemption." See 24 Cyc. 260, and cases cited; 24 Cyc. 254–e and cases cited. It may be true that parties litigant have a right to a jury of the original panel so far as it is practicable to procure it, and that the court has no right to arbitrarily discharge the regular panel without cause, and summon another for the trial of a particular case. See 24 Cyc. 251, 252 and cases cited; also State v. Atkinson, 29 La. Ann. 543; State v. Washington, 90 N. C. 664; State v. Lytle, 27 N. C. (5 Ired. L.) 58; State v. Shaw, 25 N. C. (3 Ired. L.) 532; People v. Edwards, 101 Cal. 543, 36 Pac. 7; Judge v. State, 8 Ga. 173; Hight v. Langdon, 53 Ind. 81; but the cases which hold to this proposition fall far short of holding that error is committed where a court, for reasons of its own, has discharged a portion of a panel and either provided for the calling of talesmen or for an additional panel to fill the vacancies, especially where there is no proof or suggestion of partiality on the part of such court, or of any real prejudice to the defendant. The real thing to be guarded against is the denial of an impartial jury of one's peers, and there seems to have been no such denial in the case at bar. So, too, it is well established that "where some jurors summoned fail to appear, it is not necessary, in the absence of statute, for the court to delay the impaneling of the jury or to postpone the trial; nor is it necessary for the court to have other jurors summoned to fill the places of those who are absent, or to issue attachments for the absent jurors." See 24 Cyc. 254, and cases cited. As far, too, as the objection which might have been made to the summoning of the talesmen in the place of a regular panel and without any nucleus to which these talesmen could be added, it will be seen that the error was cured by the defendant, him-

self objecting to the whole of such new panel, and by the objection being allowed. There is no merit in the points raised.

Appellant takes exception to a number of questions asked of the witness Dr. J. Semple. They were, in the main: "From the history of them, from the history given by the various witnesses named as to the condition of Mrs. Drury from the time she left here in company with the witness Gandie to the time of her death, and the post mortem examination, have you formed any conclusion as to the cause of her death?" "From the testimony of the various witnesses you have heard and who I have heretofore named, giving the history of the case as far as it relates to the deceased, have you formed any opinion as to whether there is any evidence—whether or not there is any indication of any other—any cause of death except blood poison?" The objection is made that by these questions the witness was not required to assume the truth of the testimony referred to, and that, while giving that testimony, the witnesses, or some of them, themselves expressed an opinion as to the cause of the death. It is argued that a hypothetical question and answer cannot be based upon the opinion of another witness. On an examination of the record, however, we find that there is no merit in these objections. The witness Dr. Semple, later on in his examination, was asked: "Did you say your testimony, your opinion, given yesterday, was based in part upon the opinion given by other men, or was it merely on their testimony as to the conditions they saw?" The answer was, "Yes." This, of course, was open to two constructions, but the question was followed by another, which was: "Doctor, didn't you tell me it was based upon everything Dr. Ruediger said upon the stand?" Answer. "Yes, I said that." Question. "And it was based upon his opinion given on the stand?" Answer. "I had formed an opinion without hearing his opinion. I have formed an opinion from the description of the different conditions. My opinion *with reference to blood poisoning was formed from the testimony alone, and not from the opinion of anybody. I did not take anybody's opinion, as there were sufficient facts testified to to form my own opinion.*" It is clear, indeed, from this testimony, that the doctor based his opinion upon the facts disclosed, and not upon the opinion of others.

There is, however, another and controlling reason why the case should not be reversed on account of the questions and answers referred to.

This reason applies both to the objection that the doctor was giving an opinion based upon an opinion, and to the objection that the question did not assume the truth of the testimony or facts referred to. It is that the objection in the trial below was not sufficiently definite. The objection was merely that "the question was incompetent, irrelevant, and immaterial, no foundation laid, and an improper question,—*improper to ask for the opinion of the doctor.*" This form of objection was entirely too general to call the court's attention to the particular vices now pointed out. Appellant should have pointed out the particular defect which rendered the question either incompetent, irrelevant, or immaterial, or wherein it was not a proper hypothetical question, in order that the objection could have been intelligently ruled upon by the trial court, and, if necessary, the defect obviated. Howland v. Oakland Consol. Street R. Co. 110 Cal. 513, 520, 42 Pac. 983; Seckerson v. Sinclair, 24 N. D. 625, 140 N. W. 239; Reeves v. Chicago, M. & St. P. R. Co. 24 S. D. 84, 123 N. W. 498; Stahl v. Duluth, 71 Minn. 341, 74 N. W. 143.

Objection is also made that the court erred in overruling defendant's objection to the questions propounded to Dr. E. V. Gustafson; namely, "Q. Doctor, when another physician is called in a serious case, what is the custom of the first physician? What does he usually do?" and, "Tell him everything he knows about the case?" and "including everything he has done and prescribed?" The objection made to these questions was that they were incompetent, irrelevant, and immaterial, no foundation laid, and not in any way binding upon this defendant. They were evidently asked for the purpose of showing to the jury concealment on the part of the defendant, and that when he summoned Dr. Gustafson to aid him he did not tell him what operations he had performed. The objection made in this court is that it was an attempt to prove a custom without showing what the custom was in the vicinity, and what was the custom of the defendant, or that the defendant knew of the existence of the custom. "What the witnesses would or would not have done under similar circumstances cannot be a criterion," appellant urges, "as to what the defendant should have done under similar circumstances." There is no merit in this objection. "If there is a general usage applicable to a particular profession or business, parties employing an individual in that profession are supposed to deal with

him according to that usage." 12 Cyc. 1044. Even if it could be possibly argued that the local custom in this respect might have been different from the general, the objection raised in the trial court is hardly specific enough to suggest the objection.

Exception is next taken to the refusal of the court to allow an answer to the following question propounded to Dr. Gibson on cross-examination: "How is this done?" and, "Isn't it a fact within medical knowledge that these intentional abortions you speak of are performed by the woman herself, and are often done by the use of a needle, knitting needle, lead pencil, or some other instrument?" The objections made to these questions were that they were not proper cross-examination. The purpose of the question was to show that the wound might have been inflicted by the woman herself, by means of a knitting needle, lead pencil, or some other instrument. Before the examination was over, the doctor thoroughly covered this point. He said: "It would be a difficult thing to introduce an instrument and to push it through the side of that, herself. It is not very easy to go through the side of the cervix. Shock would immediately follow. I base those reasons on the size of the wounds and on the firmness of the tissues. A sharp and pointed instrument would more easily penetrate. It would be possible to produce a wound in the same region by penetration of a smaller instrument than a dilator. A knitting needle, for instance."

So, too, when the objection was made, the following colloquy took place:

The Court. Is that with reference to the statement that the patient could not have done it herself?

Counsel for defendant. Yes, sir.

The Court. I think you can find out why he said so, but he cannot be an expert and know whether a woman frequently does so or not. That is not a subject for expert testimony. I will sustain the objection. You can cross-examine, however, on his reasons for saying she did not do it.

And counsel for the defendant then asked the following question: Doctor, you said yesterday that this wound could not have been made by the woman herself. What are your reasons for that opinion? This last question, as above stated, the witness was allowed to fully answer. Reference is made, we know, by counsel, to the opinion in the case of

State v. Moeller, 20 N. D. 114, 126 N. W. 568, — N. D. —, 138 N. W. 981, and to a ruling therein on a similar question. The language of that opinion, however, is in no way in conflict with our opinion here. The opinion merely said: "Error is assigned because Dr. Engstad was not permitted to testify in substance that it was not uncommon for women illegitimately pregnant to inflict injuries upon themselves, particularly upon the uterus, in an attempt to produce a miscarriage and conceal their condition. We do not pass upon the objection taken to questions of this nature, for the reason that the court records how similar questions were asked of experts and answered, and there is no conflict in the evidence on this point, and an answer to this question, if in favor of the appellant's contention, would only have been cumulative. Hence, if it was error to sustain the objection it was error without prejudice." There was, it will be seen, in the opinion no attempt to pass upon the correctness of the question, and we do not believe that the question was at all competent or pertinent. The reason given by the trial court, indeed, sustaining the objection, was entirely sufficient. What other women did or had done was not a subject for expert testimony. Whether a woman could perform the operation upon herself was a proper subject for such testimony, and to this fact the witness was allowed to testify. Not only was this the fact, but Dr. Ruediger, one of the witnesses for the state, testified that the thing could be done. "There is," he said, "nothing in the location or direction of this wound that would prevent a smaller wound to have been made in the same way by a smaller instrument. A knitting needle could have penetrated in the same general direction if used by the woman. A pencil is doubtful. It might be possible, but I doubt it very much. It might be possible." The point in issue, indeed, was not what other women had attempted, but whether the particular act in question could have been inflicted by these means. It was, in fact, whether a wound of the size and nature of that in question could have been inflicted by the deceased herself. We do not find that the defendant was in any way restricted from proving these facts.

The next point is that the court erred in sustaining the state's objection to the following question propounded to Dr. Gibson: "We will assume, then, doctor, that there has been a small wound in the cervix. Now, assuming that a wound was made with the point of a lance or

point of a pin, or something of that nature, is it not a fact that this infection and putrefaction might start from that kind of a wound?" It is doubtful whether there was any evidence in the record on which to base this question. Even if there was, no material error was committed in excluding it, as the question was fully answered by other witnesses, —in fact, by practically all of the witnesses for the state. Dr. Gibson, for instance, testified that "a sharp instrument would be more likely to penetrate, and if there was infection on the instrument that produced it, on the knitting needle for instance, a smaller instrument that produced it would set up infection in the uterus, very likely. Dr. Ruediger went further than this, and testified that "it is possible, if a knitting needle penetrated that cervix in the same manner in a general way where the perforation in this case was, that the woman could be up and about. Probably infection would start." And, again: "I testified yesterday and said that all instruments should be sterilized before the operation. It is very probable the infection was taken into the wound from the instruments or by means of the instruments not being sterilized. It is my theory that infection was carried in with the instrument that made the penetration, in all probability. That is what I want the jury to infer. If there was infection in the mouth of the cervix at the time the instrument passed through, infection would quite probably be carried into the wound in that way, though you assume that the instrument was thoroughly sterilized. A germ might attach to the instrument as it passed through the infected region."

Another objection is made to the question asked of Dr. Gibson: "Did the doctor tell you the history of the case?" This objection is a reassignment of a former one, but this time the point is urged that by the question the doctor was asked to give an opinion. It is urged that when he said that a history was given he did not, and could not, know whether the facts related to him were history or not,—that is to say, a complete history. The weakness of the objection is too clear to need argument further than to say that if the history related was incomplete the facts could easily have been drawn out on cross-examination,—that is to say, whether or not the defendant told him of the operation upon the womb.

Objection is made to the refusal of the court to allow the witness

Nellie Gandie to answer the questions: "Did Dr. Gustafson himself give her any treatment at that time?" and "Has he, that is to say, Dr. Reilly, ever visited you or attempted to communicate with you?" These questions were asked on cross-examination, and were not, strictly speaking, proper in such examination at such time in the order of proof. It is also difficult to see how any prejudice was occasioned by the refusal to allow them. The witness had testified: "I have never talked to Dr. Reilly what my testimony was to be in this case prior to last night," and it would seem that this sufficiently covered the point. So, too, the extent and scope of cross-examination is within the sound discretion of the court, and there must be some limits thereto. State v. Foster, 14 N. D. 561, 105 N. W. 938; State v. Longstreth, 19 N. D. 268, 121 N. W. 114, Ann. Cas. 1912D, 1317; 8 Enc. Pl. & Pr. 109.

Objection is also made to the action of the court in not refusing to allow Dr. Gibson to testify, on the ground that no foundation was laid for his testimony. The doctor testified: "My name is S. G. Gibson. I am a physician and surgeon, and have practised eighteen years. I am a graduate of Western University. I have practised my profession in Langdon ever since I graduated. I have treated all kinds of ailments and sicknesses. I have performed surgical work. I am county coroner." Objection is made that there is nothing in this testimony to show that the doctor was a graduate of any medical school, and that he had ever been licensed to practise medicine and surgery. There is nothing in this point. The foundation laid abundantly showed the capacity of the doctor as an expert witness. Whether he had been licensed to practise medicine in North Dakota, or was a graduate of a medical school, might have been pertinent in an action brought by him to recover fees, or in a criminal prosecution for practising without a license, but it was in no way controlling as to his capacity as an expert. So, too, the objection is nowhere to be found in the abstract, and merely appears in the assignments of error and in the brief of counsel.

Counsel next assigns as error the giving of the following instructions: "It is not your fault that this prosecution is commenced, or that a crime has been committed, and if a crime has been committed by the defendant at the time and place and in the manner and form charged, then he has no right to ask or expect at your hands anything else than

a verdict saying so; nor has the state a right to ask a conviction of a person who has not committed a crime." It is urged that in this instruction the court tells the jury that a crime has been committed, and that the fact that a crime has been committed is one of the material and essential allegations of the information. Counsel, in fact, urges that by the instruction the court tells the jury that the *corpus delicti* is proven. This we do not believe to be the case. Technically speaking a crime had been committed. It is practically undisputed that an abortion was performed either by the deceased herself, or by the defendant, or by some third person. The performing of such an operation upon one's self is a crime. See § 8913, Rev. Codes 1905. Even if there is in the charge a possible suggestion that the crime referred to was the crime charged against the defendant, the error, if any, was abundantly cured by the other portions of the charge. In the charge as a whole the jury is instructed that "the defendant is entitled to every presumption of innocence compatible with the evidence in this case, and if it is possible to account for the death of the deceased upon any reasonable hypothesis other than that of the guilt of the defendant, it is your duty to so account for it, and find the defendant not guilty." The allegations of the information are then recited to the jury in full and the jury are told that they must be proved beyond a reasonable doubt. The record also shows that in the instructions asked by the defendant, he himself everywhere took the position that a *crime had been committed.* We are satisfied that the instructions as a whole, if reasonably considered and interpreted, fully presented the issues to the jury, and that there was no error of which the defendant can complain.

Exception is also taken to the following charge: "Now, gentlemen of the jury, one witness, Nellie Gandie, has gone on the witness stand and given her testimony, and the defendant in this case, through this case, charges her with being an accomplice in *the crime,* if any crime was committed. Now, gentlemen, I charge you that an accomplice is defined as an associate in crime,—one who co-operates, aids, or assists in committing it. You are instructed that if you find that Nellie Gandie was an accomplice of the defendant, that is, a person who actually committed or assisted or participated in *the crime,* that such evidence is admissible." Here, again, it is argued that the court assumed that a crime had been committed. We do not think that this is the case.

The court expressly qualified his language by adding the words: "If any crime was committed," and these words are found immediately following the words, "in the crime," where they are first used in the specific charge. It is true that no such qualification was made immediately before the words, "in the crime, that such evidence is admissible," but the instruction must be taken as a whole, and, taken as a whole, we think the instruction was not prejudicial.

Again, exception is taken to that portion of the charge which reads as follows: "Gentlemen of the jury, some of the testimony tending to connect the defendant with the commission of *the crime* charged is what is known as circumstantial evidence." It is urged that it was for the jury to say whether the evidence tended to connect the defendant with the crime, and that the court had inadvertently usurped the province of the jury. In support of this the cases of State v. Porter, 74 Iowa, 623, 38 N. W. 514; Chapman v. State, 109 Ga. 157, 34 S. E. 369; Stephens v. State, 118 Ga. 762, 45 S. E. 619; Santee v. State, — Tex. Crim. Rep. —, 37 S. W. 436; Reese v. State, 44 Tex. Crim. Rep. 34, 68 S. W. 283; Reese v. State, — Tex. Crim. Rep. —, 70 S. W. 424; Cortez v. State, — Tex. Crim. Rep. —, 74 S. W. 907; Cavaness v. State, 45 Tex. Crim. Rep. 209, 74 S. W. 908; McCleary v. State, 57 Tex. Crim. Rep. 139, 122 S. W. 26, are cited. The objection at best is a technical one, however, and we have serious doubts as to the wisdom of some of the rulings cited. So, too, in this case defendant is hardly in a position to complain or suggest error both in regard to this and the prior objection in regard to the evidence of the accomplice. The instructions given by the court used the same phraseology which was repeatedly requested by the defendant himself, in his proposed instructions. The instructions asked by the defendant were as follows: "Under the laws of this state no conviction can be had in this kind of a case upon the uncorroborated testimony of an accomplice. It is for you to determine from the testimony in this case whether or not the witness Nellie Gandie was an accomplice in the commission of *this crime*. If you find, as a fact, that Nellie Gandie was associated, aided, co-operated, or assisted the defendant, James J. Reilly, *in committing it*, then no conviction in this case can be had unless her testimony is corroborated by some other credible testimony in this case; and the corroboration is not sufficient if it merely shows the commission of the

offense or the circumstances thereof, but such corroborative testimony must tend to connect the defendant with the commission of *the crime.*" This instruction was refused merely because it was covered by those given. Again, the defendant asked for this instruction: "You are instructed that if you find that Nellie Gandie was an accomplice of the defendant, that is, a person who actually commits or assisted or participated *in the crime,* that such evidence is admissible," etc. Again: "If you find that the witness Nellie Gandie was an accomplice, you must disregard her testimony unless it is corroborated by testimony that tends to connect the defendant with the commission of *the crime,* and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof; and a proper test is this: Is there testimony in the case if, standing alone, it tends to connect the defendant with the commission of *the crime?*" Again: *"The only other testimony in the case tending to connect the defendant with the commission of the crime,* apart from the testimony of Nellie Gandie, is what is known as circumstantial evidence, and the jury are instructed as a matter of law that circumstantial evidence is legal and competent in criminal cases, and if it is of such a character as to exclude every reasonable hypothesis other than that the defendant is guilty, it is entitled to the same weight as direct testimony." It will be clearly seen that the court merely used the language of the defendant himself, and that the defendant cannot complain. Pierce v. Millay, 62 Ill. 133; Weller v. Hawes, 49 Iowa, 45; Campbell v. Ormsby, 65 Iowa, 518, 22 N. W. 656; Smith v. Sioux City & P. R. Co. 38 Iowa, 173; State v. Haines, 160 Mo. 555, 61 S. W. 621; Horton v. State, 120 Ga. 307, 47 S. E. 969; People v. Biggins, 2 Cal. Unrep. 303, 3 Pac. 853; Hudson v. State, 28 Tex. App. 323, 13 S. W. 388; Carter v. United States, 1 Ind. Terr. 342, 37 S. W. 204; Quattlebaum v. State, 119 Ga. 433, 46 S. E. 677; Whitmore v. State, 72 Ark. 14, 77 S. W. 598; Clay v. State, 15 Wyo. 42, 86 Pac. 17, 544; State v. Campbell, 210 Mo. 202, 109 S. W. 706, 14 Ann. Cas. 403.

Objection is also made to the following charge: "The term feloniously applies to the manner and intent with which an act is done, and includes the commission of an act which, when done, would result in a felony as defined by our statutes; and in this respect I charge you, gentlemen of the jury, that our law presumes that a person intends

the reasonable consequences of his voluntary act, and such presumption may be satisfactory if uncontradicted. The law further presumes that an unlawful act is done with an unlawful intent; and if the state has shown to your satisfaction, beyond a reasonable doubt, that an unlawful act has been committed by the defendant, that said unlawful act or acts was the act charged in this information, then you are at liberty to presume that the same was done with an unlawful intent, and that he intended the ordinary consequences of his voluntary act, unless the same is contradicted." It is objected that this instruction permits the jury to presume from one fact another fact which is essential to be established to the satisfaction of the jury beyond a reasonable doubt. And, again, exception is taken to the instruction: "I charge you, gentlemen of the jury, that our law presumes that a person intends the ordinary consequences of his voluntary act, and such presumption may be satisfactory if uncontradicted. The law further presumes that an unlawful act was done with an unlawful intent; and if the state has shown to your satisfaction, beyond a reasonable doubt, that an unlawful act was committed by the defendant, that said unlawful act or acts was the act charged in this information, then you are at liberty to presume that the same was done with an unlawful intent, and that he intended the ordinary consequences of his voluntary act, unless the same is contradicted." The objection of counsel to these instructions is somewhat incoherent. He argues that the instructions are erroneous in that "they violate every right of the defendant as to presumption of innocence and of reasonable doubt, and permit the jury to presume, from one fact, another fact which is essential to be established to the satisfaction of the jury beyond a reasonable doubt." He says that "the basis of the prosecution rests on the statute of abortion, being § 8912, Rev. Codes 1905; that is, the facts necessary to constitute the crime of abortion must first be shown, and, when shown, if death results from the doing of the thing in the abortion statute inhibited, then the crime of murder in the second degree is the crime committed." "One of the essential ingredients of the crime of abortion," he adds, "is that the act was done with the intent thereby to procure the miscarriage of such woman. Intent is an essential ingredient of the crime. That intent must be established beyond a reasonable doubt. The defendant need not prove absence of intent. The state must show its presence. The

court tells the jury that they may presume that such intent existed. The acts which really caused the abortion may be proven, and yet the defendant may have had an innocent intent in doing those acts. He may have operated on her, and the jury may have found that he did all the acts testified to respecting the abortion, yet that would not be sufficient on which to convict him unless he did those acts with the intent to procure a miscarriage." He also cites the case of State v. Denny, 17 N. D. 519, 117 N. W. 869, in which this court held that an instruction was erroneous which, in defining the term "feloniously," defined it as an intent to commit a felony, or an intent to commit an unlawful act which might result in the commission of a felony. On the last point, however, we have merely to suggest that in the case referred to the court used the word "might," while in the case at bar the court used the words "which, when done, would *result,*" and in this difference there is a palpable distinction. So, too, even in the case referred to, the court held that the instruction given was not prejudicial.

The basic trouble with counsel in the whole matter is that he does not give, in his brief, the whole instruction, nor look upon the instruction as a whole. He seems to ignore the fact that though a miscarriage which is unnecessary to preserve the life of the mother is an essential ingredient of the crime charged in the information in the case at bar, the crime charged is not the bringing about of an abortion, but the crime of murder in the second degree. In instructing the jury on the point that the law presumes that a person intends the ordinary consequences of his voluntary act, the court was merely instructing upon the general proposition that in such cases, that is, cases where the crime of murder in the second degree is charged, an actual intent to bring about the death of the woman is not necessary in order that the wilfulness or felonious intent necessary to the crime of murder may be proved. If the miscarriage, indeed, was not necessary, to preserve the life of the woman, and if it resulted in her death, then the rule that one intends the natural consequences of his act could be made to apply in so far as the charge of murder in the second degree was concerned, even though there was no intention to kill the deceased. The court was merely instructing upon the wilfulness and the felonious intent necessary to the committing of the real crime charged, which was murder in the second degree. See §§ 8789 and 8796, Rev. Codes 1905. We

realize fully that before the commission of the crime charged (murder in the second degree) could be proved, there must first have been proof that the original act was unlawful; that is to say, that a felony had been committed, and that the jury must have been satisfied that the miscarriage was attempted or brought about, and was not necessary to preserve the life of the woman. On this point, however, the jury was fully and repeatedly instructed, and having been so instructed, the remaining portion of the charge was not prejudicial. The instruction as a whole on the proposition is as follows: "The defendant is charged with the crime of murder in the second degree, and the term 'murder' includes homicide, or the killing of a human being. Under our statutes, gentlemen, homicide is defined as the destruction of the life of a human being by the act, agency, procurement, or culpable omission of another, and where such homicide is perpetrated wilfully, unlawfully, and feloniously without any design to effect death by a person engaged in the commission of a felony, then it becomes murder, and if the felony charged is the felony of procuring an abortion, then it is murder in the second degree, and if this is proven, the consent of the deceased to procuring the abortion is no defense. If murder is committed, any person concerned in the commission of the crime is no less guilty because someone else may have been present and assisted, or the deceased consented, whether the others be prosecuted with him or not. I have stated to you that homicide, that is, the destruction of the life of a human being by the act, agency, or procurement of another, when perpetrated by one engaged in the commission of a felony, is murder, even though such person did not have a design to effect the death of the person, when done wilfully, unlawfully, and feloniously. In connection with this, the court instructs you that the word 'feloniously' imports any act or omission declared or defined to be a felony by the laws of this state. The state charges that the defendant in this case took the life or caused the death of one Lillian Drury, and destroyed her life at a time when he was engaged in the commission of a felony, though he did not have any design to effect her death, and the state further charges that the felony which the defendant was engaged in committing on the said Lillian Drury was the felony of procuring an abortion. Now, gentlemen of the jury, every person who uses or employs any instrument or other means whatsoever upon any pregnant

woman, with the intent thereby to procure the miscarriage of such woman, unless the miscarriage is necessary to preserve her life, is guilty of a felony under our statutes, and if, while engaged in the commission of a felony, or as the direct result of the commission of a felony, he thereby destroys the life of the said pregnant woman, he is guilty of murder in the second degree, even though he had no design or intent to cause her death. You, gentlemen of the jury, must determine from the evidence whether or not a miscarriage was or was not necessary in order to preserve the life of the said Lillian Drury, provided that a miscarriage was in fact procured or attempted to be procured by the defendant as charged in the information, *and if a miscarriage was attempted by the defendant, and it is shown to your satisfaction, as required that it was not* necessary, and that death resulted from this act, and that this act was performed by the defendant, then he would be no less guilty even though he had no intent whatsoever or any idea of causing her death. It is not necessary for the state to show or to prove that a miscarriage was in fact produced or procured by the defendant. It is sufficient if the state shows, so far as the procurement of the miscarriage is concerned, that she came to her death by reason of the employment upon her person by the defendant of any instrument whatever with an intent on his part to procure the miscarriage, *unless said miscarriage was necessary to preserve her life.* The state is not required to prove any motive on the part of the defendant for any act the state shows he did, though the presence or absence of motive may be weighed by you if you desire. The burden of proof in this case, as in all criminal cases, is upon the state to prove to your satisfaction, beyond a reasonable doubt, all the material allegations of the information, but, gentlemen, upon a trial for murder, when the commission of the homicide by the defendant has been proven, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon the defendant, unless the proof on the part of the prosecution tends to show that the crime committed amounts to manslaughter, or that the crime was justifiable or excusable. This burden of proof resting upon the state applies to all of the material allegations of this information, which includes the necessity of showing that the miscarriage, if any was procured, was not necessary to save the life of Lillian Drury, but in this respect I charge you that the state is not

required to prove the non-necessity by any particular form of evidence. If all of the facts and circumstances in this case sufficiently establish this fact by the degree of proof required, then the state is not required to prove this by any particular form of proof." We cannot say that we approve of the form in which the instructions were given. We cannot find, however, that their giving constituted reversible error.

Appellant also takes exception to the charge of the court to the effect that "if any witness has been shown to have wilfully and knowingly testified falsely in regard to some material matter, you are at liberty to disregard his testimony entirely unless corroborated by credible testimony." He argues that this instruction singles out the testimony of the defendant, given in this case, and that the court in this instruction referred directly to the defendant and the testimony given by him. There is absolutely no merit in this objection. There were a number of other witnesses, and there was no direct reference to the defendant. Appellant further excepts to the charge, for the reason that it omits the qualifying clause, "unless corroborated by the facts and circumstances proven on the trial." There is no merit, however, in this contention. The cases cited by counsel, indeed, in support of his proposition, themselves support, rather than condemn, the instruction. They are: Mercer v. Wright, 3 Wis. 645; Allen v. Murray, 87 Wis. 41, 57 N. W. 979; Morely v. Dunbar, 24 Wis. 185; Hillman v. Schwenk, 68 Mich. 293, 36 N. W. 77; Blotcky v. Kaplan, 91 Iowa, 352, 59 N. W. 204; State v. Musgrave, 43 W. Va. 672, 28 S. E. 813; F. Dohmen Co. v. Niagara F. Ins. Co. 96 Wis. 38, 71 N. W. 69. It is true that the last two cases cited hold that the instructions given were erroneous, but this was not on account of any play on words in regard to the meaning of the word "credible." In the Dohmen Case it was because testimony was required by the instruction to be corroborated by witnesses, when, as a matter of fact, one credible witness might have been sufficient, while in the Musgrave Case the court took the position that the giving of an instruction on the subject at all would be an invasion of the province of the jury. Almost the identical instruction was given in the case of State v. Winney, 21 N. D. 72, 128 N. W. 68.

Exception is also taken to the instruction: "Now, gentlemen of the jury, one witness, Nellie Gandie, has gone on the witness stand and given her testimony, and the defendant in this case, through this case,

charges her with being an accomplice in the crime, if any crime was committed." Counsel argues that in another part of the charge, to which we have before referred, the court told the jury that a crime had been committed, and here tells the jury that the defendant claims the said Nellie Gandie to be an accomplice in the crime. In other words, that he tells the jury "that Nellie Gandie aided, assisted, and, by so doing, became an accomplice, and that the defendant admits his participation in the crime by reason of calling her his accomplice." This contention is hardly borne out by the language of the instructions. If, in the prior portion of the charge, there were any suggestions that a crime had been committed, this, as we have before stated, was merely in response to the suggestions and proposed instructions of the defendant himself; for he, time and again, proposed instructions which assumed the commission of a crime, while in the particular charge before us the suggestion is negatived by the use of the words, "if any crime is committed." If the language used had been that "even if the jury find from the evidence that a crime has been committed, still the defendant maintains that Nellie Gandie would be an accomplice thereto, and her testimony, therefore, unless corroborated, would be inadmissible," we think there could have been no objection to the instruction, and this was the meaning the instruction as a whole clearly conveyed. We must remember that the defendant himself, by several proposed instructions, asked that the jury be instructed upon this phase of the case, and himself suggested the language to which he now objects. We cannot read the instructions as a whole and believe that any prejudice was committed in this respect.

Exception is also taken to that part of the charge in which the court instructed the jury: "But, gentlemen, upon a trial for murder, when the commission of a homicide by the defendant has been proven, the burden of proving circumstances of mitigation or that justify or excuse it devolves upon the defendant, unless the proof on the part of the prosecution tends to show that the crime committed amounts to manslaughter, or that the crime was justifiable or excusable." It is claimed that this instruction is perfectly proper in a case where a defense is interposed such as insanity or self-defense, but not in a case like the one at bar; that "it is misleading and places the burden of proof upon the defendant, compelling him to prove such things as will

excuse, such as that he had no intent to procure a miscarriage, or that it was necessary to preserve her life." Defendant maintains that the burden in this case regarding justification or excuse does not shift, and can never be placed on the defendant's shoulders. He maintains that had the case been simply one of procuring an abortion, and the court had charged, "The commission of the abortion being proven, the burden of proving circumstances of mitigation, or that justify or excuse the defendant devolves on the defendant," such a charge would have been erroneous, and cites the cases of People v. Gordon, 88 Cal. 422, 26 Pac. 502; People v. Mize, 80 Cal. 41, 22 Pac. 80; People v. Rodrigo, 69 Cal. 601, 11 Pac. 481, 8 Am. Crim. Rep. 53. It would seem, however, that the cases cited are hardly in point. The case of People v. Gordon, for instance, is a case where the charge is assault with intent to commit murder, and is not a case of homicide. The same is true of People v. Mize, while the case of People v. Rodrigo is a case of an assault with a deadly weapon. We do not commend the portion of the instruction objected to. In fact, we do not believe that it has any place, or should have been given in a case of the nature of the one at bar. We do not, however, believe that the giving of it in any way prejudiced the defendant. Just before the use of the words complained of, the court had explicitly charged the jury that the burden of proof was upon the state to prove all of the material allegations of the complaint, and that among them was the non-necessity of the miscarriage. The paragraph complained of starts out by again telling the jury that "the burden of proof in this case, as in all criminal cases, is upon the state to prove, to your satisfaction beyond a reasonable doubt, all the material allegations of the information," and ends with the statement: "This burden of proof resting upon the state applies to all of the material allegations of this information, which includes the necessity of showing that the miscarriage, if any was procured, was not necessary to save the life of Lillian Drury." It is true that between these portions the objectionable language, "but, gentlemen, upon a trial for murder, when the commission of the homicide by the defendant has been proven, the burden of proving circumstances of mitigation or that justify or excuse the defendant devolves upon the defendant," was used. In this, however, as we have before said, there can hardly have been any prejudice to the defendant. In the instruction as a whole the

court charged the jury that the defendant could not be found guilty in any event, unless it was proved, beyond a reasonable doubt, that the miscarriage was unnecessary, and that the burden of showing this fact was upon the state. It then stated to the jury, in effect, that even if this fact was proved, that is, that the miscarriage was not necessary, there was still a defense of justification, mitigation, or excuse, but in this case the burden of proof was upon the defendant. The defendant, as a matter of fact, had no such added defense, and the remarks in regard to the burden of proof were absolutely harmless and immaterial. If he had had such a defense the instruction would have been correct. Rev. Codes 1905, § 10023. The case was not one which came within §§ 8828, 8829, and 8830 of the Code, and in which justification, mitigation, or excuse could be pleaded. There was, in short, no pretense or defense that the act was done "in lawfully correcting a child or servant, etc." The instruction, in short, gave to the defendant an added defense which the law did not grant him, and its giving was to his advantage rather than to his disadvantage. Rather than tending to harm the defendant, it was calculated to leave the jury to infer that even though the state proved, beyond a reasonable doubt, that the defendant performed the abortion, and that it was not necessary, he still could be heard in mitigation and justification of his offense. The instruction, in short, was erroneous, but the error was to the advantage, and not to the disadvantage, of the defendant.

Exception is, we know, also taken to the portion of the charge which instructs the jury that "this burden of proof resting upon the state applies to all of the material allegations of this information, which includes the necessity of showing that the miscarriage, if any was procured, was not necessary to save the life of said Lillian Drury, but in this respect I charge you that the state is not required to show this non-necessity by any particular form of evidence. If all the facts and circumstances in this case sufficiently establish this fact by the degree of proof required, then the state is not required to prove this by any particular form of proof." It is argued that the jury could not have understood the charge in any other light than that, after the state had shown the commission of the homicide by the defendant, the defendant must show excuse or justification and the non-necessity of procuring the miscarriage to save her life was one of the things that must

be shown by the defendant. A mere reading of the instruction, however, will disprove this assertion.

So, too, the point is made by the counsel for the state that none of the errors in the instructions, if any, should be considered, as no objections or exceptions to the charge were filed within the time required by the statute or order of the court. A written charge was delivered in the case, but in submitting the same the court said: "The court at this time will submit to the jury a written charge, but owing to the fact that there is but one counsel for the defense, and that his time has been thoroughly taken up during the progress of the trial so that he has not had proper and sufficient time to consider the charge in order to file his written exceptions thereto, which he would be required to do before the charge was given, the court will permit the defendant to consider the charge the same as if it had been delivered orally, and save to him his right to file exceptions thereto the same as if it were an oral charge." The statutes upon the subject are as follows: Section 9987: "Upon the close of the trial all instructions given or refused, together with those prepared by the court, if any, must be filed with the clerk, and except as otherwise provided in the next section, shall be deemed excepted to by the defendant. If the charge of the court, or any part thereof, is given orally, the same must be taken down by the official stenographer, and shall be deemed excepted to by the defendant, and the same, as soon as may be after the trial, must be written out at length and filed with the clerk of the court by the stenographer thereof; provided that in case the defendant is acquitted by the jury, the oral instructions need not be transcribed or filed with the clerk; but exceptions in writing to any of the instructions of the court in any manner given, or the refusal of the court to give instructions requested, may be filed by the defendant at his discretion, with the clerk of the court, within twenty days after the instructions are all filed as herein provided." Section 9988: "The court may, in its discretion, submit the written instructions which it proposes to give to the jury, to the counsel in the case for examination, and require such counsel, after a reasonable examination thereof, to designate such parts thereof as he may deem objectionable, and such counsel must thereupon designate such parts of such instructions as he may deem improper, and thereafter only such parts of such written instructions so designated shall

be deemed excepted to or subject to exceptions." Section 10078: "The instructions requested by the defendant and refused, or by the prosecutor and given, and all the instructions given to the jury by the court in writing, or orally and written out by the stenographer of the court, and filed with the clerk, except as otherwise provided in § 10006, are deemed excepted to, and need not be embodied in the statement of the case, but the same and each of them, with the indorsements, if any, showing the action of the court thereon, form a part of the record of the action. The decision of the court upon any matters of law in this article declared to be deemed excepted to need not be embodied in any statement of the case, and forms a part of the record of the action. Any statement of the case, or exception settled, certified, and filed as provided in this article, also forms a part of the record of the action. Any error committed by the court in or by any decision, ruling, instruction, or other act, and appearing in the record of the action, may be taken advantage of upon a motion for a new trial, or in the supreme court on appeal."

We believe that the point of counsel for the state is well taken The instructions were written instructions. As a matter of right, and under § 9988, defendant could have been required to except thereto before their presentation to the jury. As a matter of grace he was permitted to "consider the charge the same as if delivered orally, and save to him his right to *file* exceptions thereto the same as if it were an oral charge." It will be noted that he was required to *file* his exceptions. There was no intimation that exceptions would be deemed taken. The court must have referred, not to the former, but to the latter part of § 9987, where, alone, the filing of exceptions is spoken of, and in which the time is limited to twenty days. We have, however, as will be seen, in this case taken the trouble of considering the instructions. We have done so, however, for the sake of vindicating the law and the judgment of the trial court, rather than because we were required or authorized to do so. We want, however, to be expressly understood as not approving of the instructions as a whole as given in this case, especially those in relation to the defense of justification and excuse. Our holding is rather that there was no prejudice to the defendant, than that the instructions were models, or were technically correct.

But it is claimed that the evidence does not sustain the verdict. We

do not, however, so hold. A number of medical witnesses testified to the evidences of a recent abortion, and that such abortion was, in their opinion, the occasion of the death of the deceased. The opportunity for its performance is proved; the fact of an operation upon the womb by the defendant, which was concealed from the doctors afterwards called into consultation, and the lack of necessity for the bringing about of a miscarriage, is fairly established. The absence of necessity, indeed, to save a woman's life, may be shown by circumstantial evidence. In fact, this is often the only method by which such lack of necessity can be proved. Dixon v. State, 46 Neb. 298, 64 N. W. 961. Some courts hold that in the absence of evidence to the contrary the state may, in the first instance, rest on the presumption existing against the necessity, and in support of this proposition the supreme court of Connecticut has said: "We think it is equally a matter of common experience that the ability to bear and bring forth children is the rule, and that the necessity of procuring an abortion or miscarriage in order to save the life of the mother or child is the rare exception; that the presumption is against such necessity; and that the state in the first instance, and in the absence of evidence to the contrary, may rest on that presumption in cases brought under the statute in question." State v. Lee, 69 Conn. 186, 199, 37 Atl. 75; State v. Schuerman, 70 Mo. App. 518. Practically all of the courts, though there are some minority opinions, hold that all that is required of the prosecution in the first instance is to make out a prima facie case, and in conformity with this rule the supreme court of Wisconsin has held that evidence of an operation on a healthy woman at her request to procure an abortion, and that that abortion was in fact procured, and that she died in consequence thereof, raises the irresistible inference that the operation was not necessary to preserve the life of the mother. Hatchard v. State, 79 Wis. 357, 48 N. W. 380; People v. Balkwell, 143 Cal. 259, 76 Pac. 1017. Even the case of State v. Aiken, 109 Iowa, 643, 80 N. W. 1073, which by some is supposed to hold to a contrary rule, lays emphasis upon the fact that in that case there was no evidence of illicit intercourse, no showing as to the fact of whether the woman was married or unmarried, and nothing to indicate the condition of her health except that she walked to the office of the defendant two or three times.

The testimony of Nellie Gandie is that, except for the hemorrhoids,

Mrs. Drury appeared well and healthy and normal; and there is nothing to contradict this testimony, at any rate until she had been under the care of the doctor for some days. These facts, with the added fact of the failure of the defendant to acquaint Drs. Gustafson and Gibson with the fact of the operation, if any, and with anything of the history of the case except the taking of the morphine tablets and the operation for piles, would seem to bring it within the authorities cited. So, too, there is no little authority for the proposition that when, as in the case at bar, there is no pretense or defense that the miscarriage was necessary, but the defense consists in a denial that such miscarriage was accomplished at all, no direct proof of the necessity is incumbent upon the state. "The guilty intent of the defendant," says the supreme court of Oregon in State v. Glass, 5 Or. 73, 85, "is presumed if the statutory ingredients of the crime are shown. The mind of man can only be explored by weighing his conduct. It devolved upon the state to show that the removal of the fetus was not necessary to preserve the life of deceased, and the degree of certainty with which this is required to be shown is such that no competent person can be presumed to have believed the act necessary. In this case, had the jury found that the circumstances were such as to induce in a competent person a belief that the removal of the fetus was necessary, or had the testimony left that fact in doubt, this would have been sufficient to create a reasonable doubt in their own minds as to the necessity of the act, and the prisoner must have been acquitted. A case might arise where there were circumstances at the time of treatment calculated to lead to a conclusion which subsequent developments would show was erroneous. But this is not such a case, and the court may refuse to instruct the jury where there is no testimony to which such instructions can apply. There was no attempt made to show, nor was there anything tending to show, that the act charged as a crime was or appeared to be necessary to preserve the life of the deceased. The theory of the defense was that defendant had no agency in the removal of the fetus, and not that its removal was, or was thought to be, necessary to save the life of the mother. This is shown by the testimony contained in the transcript, where it is attempted to be shown that deceased procured her own death by the use of drugs prior to her meeting with the defendant. More than this, every fact relied upon by the prosecution

to show the act unnecessary was within the reach of defendant if he is a competent physician, at the time he treated deceased."

In the case at bar, as we have before intimated, the defense was not that the procuring of the miscarriage was necessary, but that no miscarriage was accomplished by the defendant at all, and it seems to come clearly within the rule last cited.

As far as the *corpus delicti* is concerned, it is well established that the same may be proved by circumstantial evidence, and it would seem that the proof in this case was sufficient. There was evidence of a large hole or aperture in the uterus. There is also some evidence that this tear could not have been accomplished by the woman herself. There is evidence of an opportunity for the accomplishment of the crime on the occasion of the first visit to the doctor, even if the jury believed that the use of the curette and of the dilator had nothing to do with the same. The commission of the crime can be inferred from the use of the curette and the dilator, coupled with the evidence of the size of the wound, and the testimony of the experts as to the fact of pregnancy and of the recent miscarriage. These matters are matters for the jury, and not for the court. See Seifert v. State, 160 Ind. 464, 98 Am. St. Rep. 340, 67 N. E. 100. The same is true of the commission of the crime generally. State v. Lilly, 47 W. Va. 496, 35 S. E. 837; Com. v. Drake, 124 Mass. 21; State v. Minard, 96 Iowa, 267, 65 N. W. 147; People v. Balkwell, 143 Cal. 259, 76 Pac. 1017; Clark v. People, 224 Ill. 554, 79 N. E. 941; Cook v. People, 177 Ill. 146, 52 N. E. 273; Peoples v. Com. 87 Ky. 487, 9 S. W. 509, 810; Howard v. People, 185 Ill. 552, 57 N. E. 441.

Objection is also made to the refusal of the court to grant a new trial on the ground of newly discovered evidence, the alleged evidence being that of one Violet Simmie, who made an affidavit to the effect that at a conversation which took place between herself and the deceased in February, 1911, while the deceased was at Milton, deceased told her that she had taken medicine and used instruments upon her womb for the purpose of producing an abortion, and that she had not told Dr. Reilly what she had done, and that Dr. Reilly did not know what she had done, and that she was afraid to tell him; that both Violet Simmie and Miss Gandie advised and told Mrs. Drury to tell Dr. Reilly at once what she had done; Dr. Reilly filing an affidavit to the effect that

this evidence was not discovered until about the 20th day of February, 1912. Such evidence, however, was merely cumulative to the former evidence of Nellie Gandie, and was not, in itself, a ground for a new trial. See 14 Enc. Pl. & Pr. 791. We know that there are cases where the mere fact that the evidence has been cumulative has not been reason for refusing a new trial. In them, however, the reason given is that the new evidence tended to make "doubtful cases clear." Hart v. Brainerd, 68 Conn. 50, 35 Atl. 776; Andersen v. State, 43 Conn. 514, 21 Am. Rep. 669; Keet v. Mason, 167 Mass. 154, 45 N. E. 81; Preston v. Otey, 88 Va. 491, 14 S. E. 68; Barker v. French, 18 Vt. 460; Ellis v. Ginsburg, 163 Mass. 143, 39 N. E. 800; Kochel v. Bartlett, 88 Ind. 237. We cannot believe that the introduction of this testimony would have in any way clarified the case at bar, or influenced the conclusion of the jury.

Another and controlling reason for refusing a new trial on this point, and on the sufficiency of the evidence generally, is that, although a notice of an intention to move for a new trial was given in the district court, the motion was in fact never made by the defendant, and never presented by him for decision.

The judgment of the District Court is affirmed.

FISK, J. (concurring specially). I concur in the affirmance, but dissent from that portion of the opinion to which ¶ 12 of the syllabus refers.

SPALDING, Ch. J. I concur, except that I express no opinion on the instructions to the jury. The conclusion announced in ¶ 12 of the syllabus meets with my approval, and renders any opinion on instructions unnecessary.

On Rehearing.

BRUCE, J.: Upon a rehearing and upon examining the judgment roll, we discover that although there is a statement that the trial court at no time extended the time for filing exceptions to the charge, the court did in fact and as a matter of law extend such time. The certificate of the court, which is attached to the roll, states among other

things that the trial judge certifies that: "The within and foregoing is a true and correct statement of the case, and contains the proceedings heard in the said trial and the exceptions of the defendant and his bill of particulars and specifications of error. Now, therefore, it is hereby ordered that the within and foregoing statement of the defendant, together with the proposed amendment of the plaintiff, state of North Dakota, that the same is correct and be allowed as and for the statement of the case in the above-entitled action, to be used in all further proceedings in said action." The record also shows that, prior to this time, an extension of the time to settle the case was allowed the defendant by the trial court provided that he filed his exceptions to the charge within a time limited. The certificate of the judge and this prior condition imposed upon the extension of the time for the statement of the case must be construed to be a waiver by that court of any limitation upon the time imposed at the trial for filing the exceptions to the charge, if any waiver there was. We must, therefore, on this rehearing, overrule the ruling made in § 12 of the syllabus and the statement in the main opinion upon which same is based, as the waiver, if any, has been excused by the trial court. Our attention has also been called to the fact, which also was not emphasized in the argument or brief of counsel, that though the first objection to the testimony of Dr. Semple, and in which he stated as an expert that in his opinion the death of the deceased was the result of blood poisoning and that she was pregnant a short time before her death, was based upon the proposition that it was in answer to a question which called for an opinion which itself was based upon an opinion, his objection was afterwards repeated in a form which added to the objections one that the doctor was called upon to invade the province of the jury.

The objection has much of suggestion in it, and is unquestionably supported by some of the authorities. It would probably be considered in Connecticut, Indiana, New York, and the Supreme Court of the United States. In Texas it would perhaps have once been considered (see Williams v. State, 37 Tex. Crim. Rep. 348, 39 S. W. 687), but hardly now (see Davis v. State, 54 Tex. Crim. Rep. 236, 114 S. W. 366; St. Louis South Western R. Co. v. Hall, — Tex. Civ. App. —, 81 S. W. 571). It would probably not be valid in Alabama, Arkansas, Delaware, Illinois, Indiana, Louisiana, Maine, Maryland, Massachusetts, Michi-

gan, Minnesota, Missouri, Ohio, Pennsylvania, West Virginia, Wisconsin, and England. It is true that counsel for appellant cites cases from these states (Porter v. State, 135 Ala. 51, 36 So. 695; Gunter v. State, 83 Ala. 96, 3 So. 600; Page v. State, 61 Ala. 16; People v. Aikin, 66 Mich. 460, 11 Am. St. Rep. 512, 33 N. W. 828, 7 Am. Crim. Rep. 345; Luning v. State, 2 Pinney (Wis.) 215, 52 Am. Dec. 154; People v. Millard, 53 Mich. 63, 18 N. W. 563), as supporting his contention. These cases, however, have either been since overruled or are cases in which there was a material conflict in the testimony as *to the facts*. The real state of the law upon the subject is laid down in vol. 17, page 253, of Cyc., where it is said: "A desire to economize time has occasionally induced the court to permit a witness examined as an expert, to ascertain the facts directly from the evidence. In some jurisdictions, but not in all, where the facts are undisputed, an expert who has heard all the testimony may be asked for his judgment 'upon the evidence,' provided that he has heard the whole of it or is familiar with it, or even upon such part of it as is material to the inquiry. . . . In some jurisdictions the practice of allowing an expert witness to ascertain the facts directly from the evidence, instead of them being embodied in a hypothetical question, has been condemned and generally disallowed; and even where the practice is allowed it is subject to limitations. There are serious objections to any other than the hypothetical question: (1) The course under consideration cannot be adopted where the facts are disputed. The witness cannot properly be asked for his judgment as to disputed matters of fact, to comment on the evidence, or to include his 'understanding' of the evidence of another witness or as to the credibility of a witness. (2) The practice unnecessarily invades the province of the jury." The overwhelming weight of authority is to the effect that such questions and evidence are permissible, provided that there is no material conflict as to the basic facts, a clear and radical distinction being made between a conflict as to the facts and a conflict as to the conclusion which the different witnesses have drawn from them. In North Dakota we have followed the majority rule as laid down in Cyc. In the case of Walters v. Rock, 18 N. D. 45, 54, 115 N. W. 511, this court said: "This question was also objected to when asked of the same witness: 'You read the testimony of Dr. Rea, and you heard the testimony of Dr. Rogers read,

you heard the testimony of Mr. Rock in regard to the condition of his lip; now from the testimony of Dr. Rea, Dr. Rogers, and Mr. Rock, state whether or not in your opinion Mr. Rock was suffering from a cancerous growth on his lip at the time he was treated by Dr. Rea in May, 1904.' The objection to this question was that it called upon the witness to pass upon the credibility of the witnesses in case of conflict. On examination of the evidence given by these witnesses, we find no conflict as to the facts stated by them. The conclusion or opinion of Dr. Rea as to what defendant was suffering from differed from that of the other medical witnesses, but as to the facts and conditions of the ailment there was no difference. For this reason the evidence was not objectionable, and did not call upon the witness to decide facts properly for the jury. The form of the question is not to be commended. It is a safer practice to incorporate all the facts relied on in a hypothetical question." We have examined the evidence in the case at bar with a great deal of care, and fail to discover any material conflict in the basic facts testified to by the physicians in the case; the conflict is over the conclusions merely. Such being the case, there is no reversible error.

Counsel for appellant also reargues his former objections to the portion of the charge which states: "I charge you, gentlemen of the jury, that our law presumes that a person intends the ordinary consequences of his voluntary act, and such a presumption may be satisfactory if uncontradicted. The law further presumes that an unlawful act was done with an unlawful intent, and if the state has shown to your satisfaction beyond a reasonable doubt that an unlawful act was committed by the defendant, that said unlawful act, or acts, was the act charged in this information, then you are at liberty to presume that the same was done with an unlawful intent, and that he intended the ordinary consequences of his voluntary act unless the same is contradicted." After reargument, however, we still can find no particular fault with the portion of this instruction which charges that one intends the ordinary consequences of his voluntary act. The basic offense is defined in § 8912, which provides that "every person who administers to a pregnant woman, . . . or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life, is punishable

by imprisonment in the penitentiary," etc. One of the main points at issue was whether the defendant intended to procure the miscarriage, and the question was from what might the jury infer such intention or how might the same be proved. Even if the intent to procure the miscarriage was proved, its non-necessity was not necessarily also proved, and this really was the crucial matter, and on this the jury was fully instructed that the burden of proof was upon the state. In instructing the jury that one intends the ordinary consequences of his voluntary act, the court merely instructed the jury that if they believed that the defendant inserted an instrument into the womb of the deceased, and was the occasion of the puncture in the uterus which the post mortem examination disclosed, and that the ordinary result of such rupture and such insertion would result in a miscarriage, and that in fact such miscarriage resulted therefrom, then the intent to procure the miscarriage could be implied. On this point the supreme court of Colorado in the case of Dougherty v. People, 1 Colo. 514, said: "It is the administering of the noxious substance, or the use of the instruments with intent to produce a miscarriage, that makes up the crime—and as to the intent it may be remarked that it is a well-settled rule of law that a sane man, a voluntary agent acting upon motives, must be presumed to contemplate and intend the necessary, natural, and probable consequences of his own acts. If, therefore, one voluntarily or wilfully does an act which has a direct tendency to destroy another's life, the natural or necessary conclusion from the act is that he intended so to destroy such life. . . . So, when a physician inserts into the womb of a woman pregnant with child instruments calculated to produce irritation and serious derangement of the female economy, and abortion follows, the intention to produce that result is a necessary conclusion from the act." We are unable to see wherein this portion of the instruction did not correctly state the law upon the subject; nor do we believe that the defendant can complain of the same in view of the fact that the jury was repeatedly instructed that the burden of the proof was on the state to prove the non-necessity of such miscarriage, as well as all the material allegations of the information. As far as the portion of the charge is concerned which tells the jury that "the law presumes that an unlawful act was done with an unlawful intent, and if the state has shown to your satisfaction beyond a reasonable doubt that

an unlawful act was committed by the defendant, that said unlawful act, or acts, was the act charged in the information, then you are at liberty to presume that the same was done with an unlawful intent," we are quite satisfied that the same was not only uncalled for and unnecessary in this particular case, but that it should not be given in cases of this kind at all. We hold, indeed, that under § 8912 and ¶ 3 of § 8789, Rev. Stat. 1905, the only criminal intent involved is the intent to procure or bring about a miscarriage which is not necessary to save the life of the woman, and that the burden of proving this non-necessity is upon the state. State v. Longstreth, 19 N. D. 268, 121 N. W. 1114, Ann. Cas. 1912D, 1317. On this, however, the jury was fully instructed, and upon reading the whole of the charge we cannot, without indulging in a metaphysical refinement, which the ordinary mind is unable to follow, and which is elusive even to the mind of the technical lawyer, conceive of any way in which the jury could have been misled or the defendant prejudiced. The court undoubtedly had in his mind the implied malice or intent which was a prerequisite to the crime of murder at the common law. In the case at bar it would seem that this implied malice was not necessary to be proved or presumed, and the instruction therefore was unnecessary. That it was unnecessary, however, does not prove in any sense that it was harmful, and on reading the charge as a whole we cannot believe that it was so. The instruction in short seems to have been thought necessary by the court on account of the language used in State v. Belyea, 9 N. D. 353, 83 N. W. 1, in which this court said: "Reference is here made to the repeated employment of the phrase, 'maliciously, wilfully, and of their malice aforethought.' These words import and correctly describe a deliberate homicide. In other words, they constitute the best possible description of motive in the crime of murder in the first degree, nor are such words either necessary or proper in describing the crime defined by § 7177 (Rev. Codes 1895). To that offense 'malice aforethought' is not essential. On the contrary, that statutory crime may be fully consummated without any criminal purpose and by one animated only by kindly motives. The offense is committed if the designated means are used upon a pregnant woman with the intent to procure the miscarriage of such woman, when such miscarriage is not in fact necessary to save the life of the woman. The law leaves it for a jury to de-

termine whether or not any miscarriage was necessary to save the life of the pregnant woman, and if, in the judgment of twelve men, a miscarriage of the woman was not necessary to save her life, a verdict of guilty may be returned regardless of the motives governing the accused. It is therefore entirely clear that words which are adapted only to a description of murder in the first degree are wholly out of place and confusing when used to describe the minor offense described in § 7177." In giving it, the trial judge undoubtedly was merely seeking to make clear to the jury the fact that, though the crime charged was that of murder in the second degree, and not the unlawful bringing about of the miscarriage, no specific intent was necessary to be proved to accomplish that murder, but the intent to procure a miscarriage which was unnecessary was all that needed to be proved. We do not approve of the instruction, but we do not think that its giving was a reversible error.

The same is true of the instruction, also excepted to by the appellant, which states: "But, gentlemen, upon a trial for murder where a commission of homicide by the defendant has been proved, the burden of proving circumstances of mitigation or that justify or excuse, that devolves upon the defendant unless the proof on the part of the prosecution tends to show that the crime committed amounts to manslaughter, or that the crime committed was justifiable or excusable." This instruction, we believe, has no place in a case like the one at bar. In order to bring the prosecution within ¶ 3 of the above section, which provides that a homicide may be committed "when perpetrated without any design to effect death by a person engaged in the commission of any felony," the state must allege the lack of design to effect the death, and must prove and allege the commission of the subsidiary felony. In the case at bar no felony was committed unless the operation was unnecessary, and the burden of proving this non-necessity was upon the state. There was, therefore, no justification to be proved. Even in a case where the instruction would have been proper, it should have contained the qualification that if, after consideration of all of the evidence in the case, the jury believed the defendant was justifiable or excusable in his acts, or if they entertained a reasonable doubt upon this subject, they should find him not guilty. See Williams v. State, — Okla. Crim. Rep. —, 131 Pac. 179. We cannot, however, believe

that the charge was prejudicial. That the state was compelled to prove beyond a reasonable doubt all of the material allegations of the complaint was repeatedly emphasized to the jury. If these facts were proved, the defendant had no justification or excuse that he could plead or prove. The only effect that the charge could have had, therefore, on the jury would have been to have made them believe that even if the state proved all the material allegations of the complaint, that is to say, the fact of the criminal operation by the defendant, its nonnecessity, and the death of the deceased as a consequence thereof, that still there was a defense of justification or excuse which could be relied upon by the defendant. It, in fact, was beneficial to the defendant, and not prejudicial, and though erroneous, was not reversible error. It is the duty of this court to insist that a defendant has all the rights that the law allows to him, and that he shall have a fair trial, but it is not its duty to enter into the domain of metaphysics, and to imagine prejudice where no prejudice can in fact exist.

We can see no reason for receding from our former position in this case, and the order heretofore entered and affirming the judgment of the trial court will stand.

FISK, J. (dissenting). Upon further consideration of the questions involved in this case, I feel constrained to depart from the views which I formerly entertained and to vote for a reversal. I am unwilling to concur in the conclusion announced by the majority, that the errors in giving the instructions complained of were nonprejudicial, and this is especially true as to the last instruction to which reference is made in the foregoing opinion. The giving of such instruction having concededly constituted error, it is presumed to have been prejudicial unless the contrary is made to appear, the burden of showing which rests upon the respondent, and as I view it there is no way of showing nonprejudice. We cannot say that the jury did not get the impression from such instruction, that the burden was cast upon the defendant of proving justification for his acts, by showing that it was in fact necessary to bring about a miscarriage of the deceased in order to save her life; or that he was actuated by proper motives in doing what he did, and that he had no intention of doing an unlawful act. It is, to my mind, quite natural and probable that the jury should have thus con-

strued the instruction, for they could not well have given it any other meaning. It, of course, needs no argument to show that if thus construed by the jury, such instruction was very prejudicial, as it would, in effect, cast upon defendant the burden of proving his innocence.

E. W. ENDERLIEN, W. R. Foster, and C. A. Wiley, Copartners Doing Business under the Firm Name and Style of The Minot Plumbing & Heating Company, v. KARI KULAAS.

(141 N. W. 511.)

Appeal — dismissal — title of action — identity of judgment.

1. An appeal will not be dismissed on the ground that the title of the action in which it is taken is imperfectly stated, when the body of the notice contains matter sufficiently identifying the judgment from which the appeal is taken.

Appeal — undertaking — amendment.

2. Following Burger v. Sinclair, 24 N. D. 326, 140 N. W. 235, appellant is permitted to furnish an amended or substituted undertaking on appeal for the original, which was imperfect.

Order for judgment — reviewable appeal from judgment.

3. An order for judgment is reviewable on appeal from the judgment.

County court — appeal from — contract — abandonment of — evidence — findings — motion — error.

4. This action was tried in county court having increased jurisdiction, and in special findings the jury found that the defendant owed plaintiff $85.67, and that a certain contract on which this action is brought had been mutually abandoned by the parties thereto. The court directed judgment notwithstanding the verdict, for the full amount sued upon. *Held*, that the correctness of this judgment depends upon the record containing evidence to support the finding that the contract had been abandoned, and cannot stand if evidence is found in the record to support it. *Held*, further, that the record contains sufficient evidence on the question to sustain the finding that the contract was mutually abandoned, and that, therefore, the granting of the motion constituted error.

Damages — breach of contract — testimony — jury — error.

5. In an action for damages claimed to have been occasioned by the breach of

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Note.—Upon the question of parol evidence to prove abandonment of contract, see note in 56 Am. St. Rep. 672.

a contract, an admission of testimony tending to aid the jury in arriving at the measure of such damages, if any, does not constitute error.

Opinion filed March 29, 1913. On petition for rehearing May 21, 1913.

Appeal from a judgment and order of the County Court having increased jurisdiction, for Ward County, *Davis*, J.

Reversed.

Statement by SPALDING, Ch. J. This action is one to recover $210.67 on two causes of action: First, for material and labor furnished in the performance of work under a contract for plumbing, etc., $85.67; the second, for $125, the amount of profit claimed by plaintiffs to have been lost because defendant refused to permit them to fully perform the contract. The contract consists in the written proposal of the plaintiffs and the conceded verbal acceptance, the entire job to be done for $720. The contract provided for the construction of plumbing, etc., in two residences belonging to defendant, situated on Fourth street, in the city of Minot, facing north. Connection with the water main and sewer had to be made by going east to Ramstad street. After the contract had been entered into the city constructed a sewer and water main in front of the residences of defendant, along Fourth street, which enabled her to make connections by going directly north from each of her houses, making 57 feet less trench to dig than was contemplated by the contract. Plaintiffs entered upon the execution of the contract, and their laborers were ordered to quit by the defendant, after having done work and furnished materials of the value alleged in the first cause of action. When defendant found that the connections could be made on Fourth street, she saw plaintiffs and demanded a change in the contract, to fit the changed conditions, and, as we have said, refused to let them proceed without it. They offered to make her an allowance of $75, while she insisted upon a deduction of $150. No further work was done, and this suit was brought. The litigation hinges around the question as to whether the original contract was abandoned, or whether it still remained in force because they failed to agree on new terms.

Special findings were made by the jury, and a general verdict rendered. The special findings were that the parties entered into a con-

tract to do the work and furnish the materials for the agreed price of $720; that such contract was abandoned by mutual consent of all the parties, on the 25th day of August, 1910; that the reasonable profit on the contract, if the plaintiff had been allowed to complete it according to its terms, would have been $100. The general verdict was for $85.67. At the close of the case, plaintiffs made a motion for the court to instruct the jury to return a verdict in their favor as prayed for in the complaint, on the grounds that the plaintiffs had fully proved their case, and that no defense whatever had been put in nor any evidence introduced by the defendant which would warrant any other verdict. An order was entered, granting this motion and directing the entry of judgment accordingly. This appeal was perfected. The court, in its order, stated that the motion was granted, in substance, on the ground that no evidence of any kind was introduced showing that the contract had been modified, changed, abandoned, or another one made in its stead; that the evidence offered by plaintiffs showed damages as alleged in their complaint, and no evidence was introduced by defendant changing or mitigating said damages; and also because the defendant had admitted, in her answer, liability for the work and labor actually performed; and that there was nothing on which to base the finding of the jury that the contract had been abandoned by mutual consent. At the proper time respondent submitted a motion to dismiss the appeal, the ground of which will be stated in our opinion.

Palda, Aaker, & Greene, Minot, for appellant.
F. B. Lambert, Minot, for respondent.

SPALDING, Ch. J. 1. The notice of appeal is entitled, "E. W. Enderlien, plaintiff, v. Kari Kulaas, defendant," and it is claimed that this defective designation of the plaintiffs renders the notice invalid for all purposes. Enderlien was one of the copartners in the plaintiff firm. The notice in all other respects sufficiently described the action in which the appeal was taken to identify it, and we think this was sufficient. The respondent could have been misled in no manner by which the defective designation of the plaintiffs.

2. The same defect and others appear in the undertaking on appeal, but appellant made application in this court for leave to substitute a

new and correct undertaking, and under the decision in Burger v. Sinclair, 24 N. D. 326, 140 N. W. 235, we must allow this new undertaking to be filed in place of the original.

3. The notice of appeal reads that it is taken from the judgment rendered in the action on the 22d day of December, 1910, and from the order of the court dated the 21st day of December, 1910, whereby judgment was given in favor of the plaintiff and against the defendant, etc. And it is alleged by respondent that the order is not appealable, and that the appeal is duplicitous. There is nothing in this contention. The order is reviewable on an appeal from the judgment, and is not an appealable one, and the notice amounts to an appeal from the judgment only.

4. The answer of defendant admits her indebtedness to the extent of $85.67, and offers judgment for that amount. The main question to be considered is whether there is any evidence in the record to sustain the finding of the jury that the contract was mutually abandoned. The evidence is set out at considerable length, and it would serve no useful purpose to review it in full; but we think there is sufficient evidence of the abandonment of the contract by the parties to sustain the finding, and that for this reason the judgment notwithstanding the verdict, for a greater amount than the verdict, was erroneous. The defendant testifies that she directed the workmen to cease working on the job, after learning of the new sewer and watermain, and that she called repeatedly to see the plaintiffs on the subject of a new contract, and that they were unable to get together on any change; and she testifies that one of the firm agreed with her suggestions that the old contract was not any good, and said he would make out a new contract, but that when she saw him he did not have time to do it; and that she did not have time to wait for them longer, and got somebody else to do the job. She testified expressly that she asked him to write out a new contract; that when she asked for a new contract he was so busy all the time that he could not make it; that she was there pretty near every day for a week; that she told them that she wanted to know how much she had to pay, because their contract was out of the way; that she asked for the bill four times, and that on the fourth occasion he told her, "You will get that some day;" that she never got a bill from him, and the first thing she knew of the amount was when the suit was brought; that

he offered to throw off $75, which she declined to accept; that he told her he would return another contract.

Plaintiffs admitted, in their testimony, that she told them that she did not want them to continue the work, and told them to discontinue it, and that they did discontinue it, and that possibly she told them to stop any further work until they "had made an agreement as to what she was going to pay us for the job;" and one of the plaintiffs testified, on direct examination, that they did not have an agreement with her after they abandoned that contract. We think this is sufficient to sustain the finding of the jury. Of course there was evidence more or less in conflict with this; and it is possible that, if we were to find the facts on the whole record, we should not make the findings made by the jury; but that is not the criterion in this case. The question is whether there was evidence to sustain their findings, and from the tenor of the testimony as a whole we think the jury might properly have found that the plaintiffs gave her to understand, or permitted her to understand, that they did not expect to proceed with the work unless a new contract was entered into, or a modification made of the old one.

5. Error is assigned on the overruling and sustaining of certain objections to questions propounded witnesses, all relating to the subject of the cost of completing the job as contracted for and the profit on it, and as to the difference in distances, etc. They all were intended to aid the jury in arriving at the measure of damages under the second cause of action set out in the complaint, and we think the rulings of the court in each instance were correct. Such evidence was admissible under the complaint, and the one question to which an objection was sustained called for a reason of the witness, and if erroneous was not of sufficient importance to notice.

The order of the trial court was erroneous, and the judgment is reversed; and that court is directed to enter a judgment in accordance with the verdict. Respondents will recover costs in the lower court to the time when the answer was served; appellant will recover her costs on all subsequent proceedings.

On Petition for Rehearing.

SPALDING, Ch. J. We are confronted with a petition for rehearing

in which the plaintiff makes very emphatic assertions and a most strenuous appeal to the court to recede from its decision. We appreciate the fact that defeated counsel, particularly when he acts for the plaintiff and litigation is instituted in reliance on his advice, may feel disappointment and even chagrin at defeat, but the judgment of counsel is not infallible any more than that of a court. There must be some final arbiter on litigated questions, and this court has been created to serve in that capacity. Its judgment may be no more enlightened or sound than that of the counsel in any case, but, whether its conclusions are right or wrong, it is the duty of its members to exercise their own judgment, after all necessary investigation and consideration of the arguments and authorities presented by counsel, and to pronounce such judgment in accordance with its most intelligent convictions. Counsel for plaintiff in any case brings his action upon the facts as stated to him by his client. When the action is brought, counsel seldom knows what testimony the defense may offer. The evidence submitted by the defendant may often surprise counsel for plaintiff and the result disappoint him, but courts must take into consideration both the case and the defense. We feel that counsel is a little hypercritical in his criticisms of the opinion. For instance, he criticizes it because therein it is stated that the houses in which the work was being done faced north. It is wholly immaterial which way they faced, but the court construed a plat contained in the abstract as showing that they faced north. We, however, accept counsel's statement that they face east. The only object in referring to the direction was to make the situation clear to the reader. We cannot restrain the feeling that counsel's petition would be more properly addressed to this court in a suit in equity wherein the issues are tried *de novo*. He seems to assume that we are to review the evidence and find the facts.

Certain principles are so elementary in the consideration of motions for a directed verdict and for judgment *non obstante veredicto* that we did not deem it necessary to call attention to them in the original opinion. Among them this will be recognized, that in such consideration the evidence must be construed most strongly against the party in whose favor the verdict or judgment is directed, or, as some courts put it, the testimony of the opposite party must be taken as true. When this rule is applied to the instant case we only have to determine whether there

is substantial evidence to sustain the verdict returned by the jury. And we still hold to the belief that, while there is a conflict in the evidence, there is substantial evidence, or enough evidence, to sustain the verdict. We do not say that if we were sitting on this case as jurors we should find the same facts that the trial jury found. Without having seen the witnesses or heard them testify, we are disposed to think that we should find the contrary, but that is neither here nor there. It was the province of the jury to pass upon the facts, so long as a conflict existed.

It is also elementary that parties could, by mutual agreement, abandon a contract before it was performed, or after partial performance. Of course, when partially performed the contractor may recover for the work done, in the absence of an agreement to the contrary. It is equally elementary that parties, by their actions or by their failure to act or by their silence, may lend their assent to a proposition of another and thereby abrogate a contract or the unperformed part. 2 Parsons, Contr. 678. In the case at bar it is a matter of indifference whether there was an express agreement that the contract be abandoned, or the plaintiffs, by their conduct and their silence, assented to the statement made to them by defendant that the contract was abrogated, or words to that effect, and with knowledge that she intended to have the job completed by others, as she told them, permitted her to incur new obligations without making known to her that they intended to hold her to their original contract. It is equally immaterial whether it was a question of a total abandonment of the contract, or an agreement that, in its original form, it was abandoned, that they might thereafter agree on a new contract changing the old one in certain respects; namely, the place of connecting with the sewer and waterworks and the amount of the consideration to be paid. If it was the former, that ended it; if it was the latter, the original contract was in effect abandoned, and no agreement reached as to the terms of a new one. The result is the same in either case. On the question of consideration, see 1 Page on Contracts, § 317. Cases in which a recovery for work done was contested are not in point. The mutual agreement of the parties constitutes the consideration. We do not consider it important what the reason for the silence of plaintiffs was when approached on numerous

occasions with reference to a new agreement, and when requested to furnish a statement of the value of the work done and materials already furnished. It is disclosed by the evidence submitted by both parties that they were in fact silent; that when the defendant told one of the plaintiff firm that they should proceed no farther on the contract, and that she would get another party to do it, they in no manner gave her to understand that they expected to stand upon their contract, or that they did not accede to her statements. She visited them repeatedly, but they were always too busy to give her a statement, and never agreed on the new consideration for the work. It may be added that there never was a formal contract reduced to writing. The plaintiff submitted specifications stating the price at which they would do the work. The defendant orally accepted their offer at a reduced price, so the only writing between the parties and governing them originally was the specifications. Malone v. Philadelphia & R. R. Co. 157 Pa. 430, 27 Atl. 756; Adams v. Boston Iron Co. 10 Gray, 495.

In addition to extracts of the evidence set out in our original opinion, we give the following excerpts:

Mrs. Kulaas testified:

"I met Mr. Enderlien first, and I talked to him about that and he said he didn't know, but would make out the papers; and I went in to Mr. Wiley, and he said he would make it out; that he didn't have any time; and I went in there every day for a week for to make up the contract, and he promised to make up the contract every day."

"I went down to Mr. Wiley and saw him about it, and he told me he would return another contract."

"It was after that I had a talk with Mr. Wiley about this change in the contract, and he promised another one. I went down, and he said he didn't have any time to make out the contract, and I went down there a week, every second day through a week, and he said the same, —he didn't have time to write out a contract; and the last time I was down there and he say I got a letter down to the postoffice and that letter told all about it. After I got that letter I went in and told (asked) them how much my bill was. I want to pay them, and he told me he would fix me. After that I went in four times and asked for the bill. I was there four times, and he said, the fourth time, 'Oh, you will get

that some days.' I never got a bill from him." "The first I knew what the amount was they was going to charge me was when they sued me."

"Three or four times I talked about it, and he promised the contract, and he didn't have time every time I come down and wanted to see how much he wanted, and he didn't have time to make it out, and he had the work done, and I had to have the work done because I had the carpenters at home and the work had to be done."

"He didn't say, 'no,' and he didn't say, 'yes,' and I went and asked him for a new contract, and he promised to write one, and he all the time was so busy, and he couldn't do it. I went in every day, pretty near a week. I was in many times after the contract, after the city put in the sewer,— that is what I mean.

"I told him the first contract wasn't any good, and it isn't. . . . I told him the contract wasn't any good,—it doesn't make any difference then. He agreed with me the first contract wasn't any good. . . . As to what the other contract was we never agreed. . . . Then I went and got somebody else to get the job, because I couldn't wait for them. They didn't have time to do the work.

"Before I let the contract to somebody else, and after I had got that letter, I went down and asked him how much the bill was, and told him I was ready to pay. I was there many times, and wanted to know what my bill was."

One of the plaintiffs testified:

"We didn't make any agreement as to what the difference in price should be, but we did agree there was going to be a change from the original contract if they run the city sewer by there. They did run the city sewer by there."

"We never submitted any figure that would reduce the price, and she didn't say anything to us in regard to it, only she wanted to figure, and I told her we would give her a figure, and we was busy and didn't do it."

Another plaintiff testified:

"She may have said something to the effect that we were not to do anything until we had agreed about what she was going to pay us. I don't remember her exact statement."

"She hinted that she was going to get other bids."

A rehearing is denied.

DAVID J. ROBER, as Administrator of the Estate of Alfred J. Rober, Deceased, v. NORTHERN PACIFIC RAILWAY COMPANY, a Corporation.

(142 N. W. 22.)

Wrongful act—railway company—ordinary care—contributory negligence—question for jury—defendant—injury—proximate cause.

Where, in a suit for death by wrongful act, it is claimed that the deceased was run over by an engine of a railway company at a street crossing in an incorporated city, and a portion of the body of the deceased was found in a frog located from 4 to 6 feet from the planking in said crossing, and within the limits of the highway; and the planking of said crossing did not extend, as required by § 4321, Rev. Codes, 1905, across the full length of the said highway, but only for about 16 feet; and there were no eyewitnesses to the accident; and some of the evidence showed that on the night in question a man could have been seen at a distance of 30 feet, and the outlines of a box car at a distance of from 150 to 200 feet; and the engineer of the engine, which it is claimed occasioned the loss of life, testified that he had switched past the crossing a number of times during said night, but that when he crossed the same he rang his bell, and that there were lights both in front and at the rear of his said engine; but the evidence also showed that the night was very cold and stormy; that a strong wind was blowing with a velocity of 30 to 45 miles an hour; that the thermometer registered 18 degrees below zero; that dust and gravel and *débris* was flying, and the crossing was not lighted; and that about an hour before the time at which the accident must have occurred a hackman drove close to an engine on the track, which the evidence tended

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Note.—The authorities on the presumption of care of person killed at railroad crossing are discussed in notes in 16 L.R.A. 261; 4 L.R.A.(N.S.) 344; and 116 Am. St. Rep. 118. And upon the right to rely on presumption of self-preservation in action for negligent killing at railroad crossing in order to prevent nonsuit where there were no eyewitnesses to the killing, see note in 11 L.R.A.(N.S.) 844.

The question of the duty to maintain lookout for persons on track, generally, is treated in notes in 25 L.R.A. 287, and 8 L.R.A.(N.S.) 1069. And as to the liability for failure to give statutory signals when they would not have prevented the injury, see note in 21 L.R.A. 723. And for failure to give customary signals as excusing nonperformance of duty to look and listen, see note in 3 L.R.A.(N.S.) 391. See also note in 26 Am. Rep. 207.

The admissibility of mortality tables in evidence is the subject of notes in 40 L.R.A. 553, and 12 Am. St. Rep. 380.

to show was the one which ran over the deceased, without seeing same or hearing any bell or signal sounded; and the next morning blood was found upon the tender of a switch engine of the defendant, *held:* that the presumption of ordinary care which is based upon the instinct of self-preservation was not overcome as a matter of law, and that the question of contributory negligence was one for the jury, as well as the question as to whether there was negligence on the part of the defendant which was the proximate cause of the injury.

Contributory negligence—burden of proof.

2. The burden of proving contributory negligence is upon the defendant.

Legal presumption—suicide.

3. There is a legal presumption that one has not committed suicide.

Crime—legal presumption.

4. There is no legal presumption that a crime has been committed, or that under circumstances such as those in the case at bar, the deceased was murdered and his body thrown upon the track.

Railway company—duty—crossings—lookout—travelers.

5. It is the duty of a railway company to keep a proper lookout for travelers at a highway crossing which is within the limits of a city.

Evidence—engineer—signals at crossings.

6. In such a case evidence is admissible that an engineer who is charged with having failed to ring his bell and to give proper crossing signals at a particular time failed to do so at the same crossing, and on the same night, and within an hour of the alleged accident, and while engaged in the same general switching transaction.

Death—mortality tables—substantial damages—expectancy—evidence—jury.

7. In a suit brought under § 7686, Rev. Codes, 1905, for death by wrongful act, the introduction of mortality tables is not necessary to a recovery of substantial damages, either to show the expectancy of the life of the deceased or of his beneficiaries. At the common law, standard tables, and in North Dakota the Carlisle tables, are proper and competent evidence for the purpose of aiding the jury, but the introduction is not absolutely necessary.

Verdict—evidence—damages.

8. Evidence examined and *held*, to sustain the verdict both as to the question of negligence and the damages awarded.

Opinion filed May 23, 1913.

Appeal from the District Court for Morton County, NUCHOLS, J.

Action to recover damages for death by wrongful act. Verdict and judgment for plaintiff. Defendant appeals.

Judgment affirmed.

This action is brought by David J. Rober, the father of, and as the administrator of the estate of, Alfred J. Rober, deceased, for the killing of the said Alfred J. Rober on the night of the 31st day of December, 1909, at Mandan, North Dakota. The defendant made the usual motion for a directed verdict and a motion for a new trial. It, however, introduced no evidence in its behalf, and submitted no written instructions, and there were no exceptions to the charge. A verdict was rendered for $2,000 in favor of the plaintiff, and a judgment rendered thereon is here sought to be reversed.

The deceased was, at the time of his death, a young man of twenty-six years of age, of good health, and in the full possession of all of his faculties. There is no evidence whatever in the record that he was a drinking man, or that on the night in question he had used intoxicating liquors. He had been making his home with his father's family practically all of his life. There were seven children in all, three girls and four boys, of whom the oldest was twenty-eight years of age and the youngest fifteen. The youngest child was a girl of fifteen, and the next in age was a boy of about nineteen. These two, with a boy of about the age of twenty-one, a girl of about the age of twenty-four, and the deceased, of about the age of twenty-six, lived with their parents. The two older daughters were married and lived elsewhere. Alfred Rober, the deceased, lived at home. He had lived there practically all of his life. The earnings that he derived from time to time from his own efforts, and which for some time prior to his death were earned in working with his father in the concrete business, and were estimated at about $4 a day, were "practically all used as a family purse." His earnings and those of his father were all turned "into the family purse," "and were not divided." The father was fifty-three years of age. The age of the mother is not given, but the fact that the oldest child was at least twenty-eight years old would lead one to infer that she was at least forty-six years of age. There is no direct testimony as to the joint earnings of the father and son, though it is shown that the

father, during most of his lifetime, had been doing carpenter work and concrete work.

Deceased, on the night of December 31, 1909, and at about 11 o'clock, left his father's house to go to a dance at the opera house. The house was two and one-half blocks from the railroad crossing where the body of the deceased was found at about 12 o'clock,—between 12 and 2 o'clock. The night was stormy and cold. There was a wind of a velocity of from 30 to 40 miles an hour, though there was probably no snow flying. The thermometer registered 18 degrees below zero. There is some testimony that on the night in question one could tell a man 30 feet away, and make out the outline of a box car 150 to 200 feet distant. One witness, however, testified that he drove within a few feet of an engine about an hour prior to the accident, without seeing it or hearing the bell rung. The deceased approached the railway track which ran east and west, from the north. There was a clear view of the yards 100 feet south of the crossing. The wind was blowing from the northwest. There is evidence that a switch engine of the company ran up and down the track and across the crossing practically all night, and that this engine was seen between 10 and 11 o'clock, with no tail light on it; also, that between 10 and 11 o'clock this engine almost ran into a witness; that it had then no tail light, and that the witness heard no gong or bell sounded. This, however, was objected to as being prior to the supposed time of the accident. Blood was found upon a switch engine in the yards of the company on the following morning, though the particular switch engine was not identified as being the one last mentioned. There is evidence, however, that another engine and crew were also operating in the yards besides the one last mentioned, though whether it crossed the particular crossing was not testified to. There were no gates at the crossing, and there was no flagman. There were no lights except the switch lights. In the middle of the crossing, and between the rails, there were planks about 14 or 16 feet in length. There was, however, no sidewalk across the track. From 4 to 6 feet east of these planks was a frog with the V pointing to the west and towards the crossing, and which, though not on the planking, was within the roadway. At the east end of this frog, which covered 4 or 5 feet, were found clothes and parts of the body of the deceased, at about 1 o'clock in the morning. Between the frog and the crossing was a piece of leg and a piece of back bone. The

frog was full of clothes and parts of flesh. At the east end of the frog there was found a foot of the right leg with a shoe on it. Part of the body and the left leg were lying at the north side of the track between the frog and the planking. The left leg was west of the end of the plank. The other leg was east of the frog. Neither of the legs, however, were in the frog. The shoe belonging to the left foot was found removed from the foot, close to the main part of the body and right beside the frog, at the east end. Pieces of the body were scattered over a distance of about 100 feet west of the crossing. The leg on which the shoe was left was cut square off between the knee and the ankle. The defendant put no witnesses upon the stand, but the engineer of the switch engine mentioned was called by the plaintiff. He testified that he ran his engine across the crossing all that night, back and forth. He, however, testifies that he did not know that a man had been killed until about 1 o'clock in the morning, when he was coming back from supper. He said that he was told this fact by the engineer of the other switch engine at that time, who was evidently in the court room at the time of the trial, but was not called by the defendant. He said that the other switch engine was in the vicinity that night, though he did not know that it crossed the crossing. He said that he left his engine about 12 o'clock. He said that he had lights on both ends of his engine and rang his bell at the crossing. He testified, however, that he never, at any time during the night, saw a man on or near the crossing, and never knew that any man was injured or killed until between 12:30 and 1 o'clock, when he was told of the fact by others; nor did he discover that there was any blood or flesh near the frog until afterwards.

Ball, Watson, Young, & Lawrence and *E. T. Commy,* for appellant.

Physical facts, ordinarily the best evidence, should be sufficient to overcome the slight presumption raised by the instinct of self-preservation. Northern P. R. Co. v. Freeman, 174 U. S. 379–383, 43 L. ed. 1014–1016, 19 Sup. Ct. Rep. 763; Baltimore & O. R. Co. v. Landrigan, 191 U. S. 461, 48 L. ed. 262, 24 Sup. Ct. Rep. 137.

The presumption of the exercise of due care is at variance with the physical facts; these facts should overcome such presumption. Garlich v. Northern P. R. Co. 67 C. C. A. 237, 131 Fed. 837; Chicago & N. W. R. Co. v. Andrews, 64 C. C. A. 399, 130 Fed. 65; Chicago, St. P. M.

& O. R. Co. v. Rossow, 54 C. C. A. 313, 117 Fed. 491; Chicago, R. I. & P. R. Co. v. Pounds, 27 C. C. A. 112, 49 U. S. App. 476, 82 Fed. 217; Pyle v. Clark, 25 C. C. A. 190, 49 U. S. App. 260, 79 Fed. 744, 2 Am. Neg. Rep. 100; Tomlinson v. Chicago, M. & St. P. R. Co. 67 C. C. A. 218, 134 Fed. 234; Rich v. Chicago, M. & St. P. R. Co. 78 C. C. A. 663, 149 Fed. 80.

A person about to cross a railroad track must bear in mind the dangers, and use his senses of sight and hearing, to avoid injury. Hope v. Great Northern R. Co. 19 N. D. 438, 122 N. W. 997; Rollins v. Chicago, M. & St. P. R. Co. 71 C. C. A. 615, 139 Fed. 639; Payne v. Chicago & N. W. R. Co. 108 Iowa, 188, 78 N. W. 813; Wabash R. Co. v. De Tar, 4 L.R.A.(N.S.) 352, 73 C. C. A. 166, 141 Fed. 932; Rich v. Chicago, M. & St. P. R. Co. 78 C. C. A. 663, 149 Fed. 84; Baker v. Chicago, R. I. & P. R. Co. 95 Iowa, 163, 63 N. W. 667; Hanna v. Philadelphia & R. R. Co. 213 Pa. 157, 4 L.R.A.(N.S.) 346, 62 Atl. 643; Crawford v. Chicago, G. W. R. Co. 109 Iowa, 433, 80 N. W. 519; Schmidt v. Missouri P. R. Co. 191 Mo. 215, 3 L.R.A. (N.S.) 196, 90 S. W. 136; Lynch v. Metropolitan Street R. Co. 112 Mo. 433, 20 S. W. 642; Mathews, Presumptive Ev. 203; Dalton v. Chicago, R. I. & P. R. Co. 114 Iowa, 257, 86 N. W. 272; 33 Cyc. 922, 923, 1072–1074, 1117, 1118; Sims v. St. Louis & S. R. Co. 116 Mo. App. 572, 92 S. W. 909; Indiana, B. & W. R. Co. v. Hammock, 113 Ind. 1, 14 N. E. 737; Beach, Neg. ¶ 64, p. 738; Woolf v. Washington R. & Nav. Co. 37 Wash. 491, 79 Pac. 997; Herbert v. Southern P. Co. 121 Cal. 227, 53 Pac. 651; Cleveland, C. C. & St. L. R. Co. v. Miller, 149 Ind. 490, 49 N. E. 445.

It is presumed that one actually saw and heard what he could have seen and heard, if he had looked and listened before attempting to cross the track. Malott v. Hawkins, 159 Ind. 127, 63 N. E. 308; Dalton v. Chicago, R. I. & P. R. Co. 114 Iowa, 257, 86 N. W. 272; Kunkel v. Minneapolis, St. P. & S. Ste. M. R. Co. 18 N. D. 367, 121 N. W. 830.

The duty of the plaintiff in such a case is twofold. He must show due care, and that defendant's negligence was the direct and proximate cause of the injury.

The rule *res ipsa loquitur* does not apply where the injured person and the negligent person were both in the exercise of an equal right and were charged with the same degree of care. 29 Cyc. 590–592;

33 Cyc. 922, 923, 1066–1068; Holbrook v. Utica & S. R. Co. 12 N. Y. 236, 64 Am. Dec. 232; Cosulich v. Standard Oil Co. 122 N. Y. 118, 19 Am. St. Rep. 475, 25 N. E. 259; Dobbins v. Brown, 119 N. Y. 188, 23 N. E. 537; DeVau v. Pennsylvania & N. Y. Canal & R. Co. 130 N. Y. 632, 28 N. E. 532; Western v. Troy, 139 N. Y. 281, 34 N. E. 780; Le Barron v. East Boston Ferry Co. 11 Allen, 312, 87 Am. Dec. 717, 3 Am. Neg. Cas. 760; Kendall v. Boston, 118 Mass. 234, 19 Am. Rep. 446; Thomas, Neg. 574, 576, 582; Gahagan v. Boston & M. R. Co. 70 N. H. 441, 55 L.R.A. 426, 50 Atl. 146.

No recovery can be had where the circumstances of the accident are not sufficiently disclosed to warrant any inference upon the question of care or negligence. Crafts v. Boston, 109 Mass. 519.

The evidence must show how the accident occurred, and what the injured party was doing, at the time. Corcoran v. Boston & A. R. Co. 133 Mass. 507; Riley v. Connecticut River R. Co. 135 Mass. 292; McGrath v. St. Louis Transit Co. 197 Mo. 97, 94 S. W. 872; Benedick v. Potts, 88 Md. 52, 41 L.R.A. 478, 40 Atl. 1067, 4 Am. Neg. Rep. 484; Cothron v. Cudahy Packing Co. 98 Mo. App. 349, 73 S. W. 279; Hamilton v. Metropolitan Street R. Co. 114 Mo. App. 509, 89 S. W. 893; Ely v. St. Louis, K. C. & N. R. Co. 77 Mo. 34; Leslie v. Wabash, St. L. & P. R. Co. 88 Mo. 50, 4 Am. Neg. Cas. 569; Yarnell v. Kansas City, Ft. S. & M. R. Co. 113 Mo. 570, 18 L.R.A. 599, 21 S. W. 1, 4 Am. Neg. Cas. 714; Bunyon v. Citizens' R. Co. 127 Mo. 19, 29 S. W. 842; Hite v. Metropolitan Street R. Co. 130 Mo. 136, 51 Am. St. Rep. 555, 31 S. W. 262, 32 S. W. 33; McManamee v. Missouri P. R. Co. 135 Mo. 447, 37 S. W. 119; Bartley v. Metropolitan Street R. Co. 148 Mo. 139, 49 S. W. 840, 5 Am. Neg. Rep. 635; Gayle v. Missouri Car & Foundry Co. 177 Mo. 450, 76 S. W. 987; Breeden v. Big Circle Min. Co. 103 Mo. App. 179, 76 S. W. 731.

There can be no recovery in damages for remote possibilities or conjectural losses. Watson, Damages for Personal Injuries, pp. 365–367; McLane v. Perkins, 92 Me. 39, 43 L.R.A. 487, 42 Atl. 255; Caven v. Troy, 32 App. Div. 154, 52 N. Y. Supp. 804; 29 Cyc. 597–600, 623, 624, 629; Jenkins v. St. Paul City R. Co. 105 Minn. 504, 20 L.R.A. (N.S.) 401, 117 N. W. 928; Philadelphia & R. R. Co. v. Schertle, 97 Pa. 454; Douglass v. Mitchell, 35 Pa. 443; Philadelphia & R. R.

Co. v. Heil, 5 W. N. C. 91; Omaha & R. Valley R. Co. v. Talbot, 48 Neb. 627, 67 N. W. 599; Welsh v. Erie & W. Valley R. Co. 181 Pa. 461, 37 Atl. 513, 2 Am. Neg. Rep. 777.

The lone fact that a person who was walking is found dead beneath a railroad engine at a grade crossing raises no presumption that those operating the engine were negligent, but negligence must be proved. St. Louis & S. F. R. Co. v. Chapman, 71 C. C. A. 523, 140 Fed. 129; Davis v. Quincy, O. & K. C. R. Co. 155 Mo. App. 312, 136 S. W. 718; Kilpatrick v. Richardson, 37 Neb. 731, 56 N. W. 481; Newhard v. Pennsylvania R. Co. 153 Pa. 417, 19 L.R.A. 563, 26 Atl. 105; Wright v. Boston & M. R. Co. 74 N. H. 128, 8 L.R.A.(N.S.) 832, 65 Atl. 687; 33 Cyc. 1061–1064, 1128, 1129; Thomas, Neg. 582; Strock v. Louisville & N. R. Co. 145 Ky. 150, 140 S. W. 40; Early v. Louisville, H. & St. L. R. Co. 115 Ky. 13, 72 S. W. 348; Louisville, St. L. & T. R. Co. v. Terry, 20 Ky. L. Rep. 803, 47 S. W. 588; Louisville & N. R. Co. v. Humphrey, 20 Ky. L. Rep. 642, 45 S. W. 503; Louisville & N. R. Co. v. Wathen, 22 Ky. L. Rep. 82, 49 S. W. 185; S. F. Dana & Co. v. Blackburn, 121 Ky. 707, 90 S. W. 237; Cameron v. Great Northern R. Co. 8 N. D. 125, 77 N. W. 1016, 5 Am. Neg. Rep. 454; Scherer v. Schlaberg, 18 N. D. 421, 24 L.R.A.(N.S.) 520, 122 N. W. 1000; Umsted v. Colgate Farmers Elevator Co. 18 N. D. 309, 122 N. W. 390.

Other independent acts of negligence on the part of the railroad company are clearly collateral and irrelevant matters. Northern P. R. Co. v. Heaton, 111 C. C. A. 548, 191 Fed. 24; Baker v. Irish, 172 Pa. 528, 33 Atl. 558; Gillrie v. Lockport, 122 N. Y. 403, 25 N. E. 357; Thomas, Neg. p. 587; Thompson v. Bowle, 4 Wall. 463, 18 L. ed. 423; Carr v. West End Street R. Co. 163 Mass. 360, 40 N. E. 185; Eppendorf v. Brooklyn City & N. R. Co. 69 N. Y. 195, 25 Am. Rep. 171, 5 Am. Neg. Cas. 219; Langworthy v. Green Twp. 88 Mich. 207, 50 N. W. 130; Hudson v. Chicago & N. W. R. Co. 59 Iowa, 581, 44 Am. Rep. 692, 13 N. W. 735; 1 Greenl. Ev. 52; Kennedy v. Spring, 160 Mass. 203, 35 N. E. 779; Greeno v. Roark, 8 Kan. App. 390, 56 Pac. 329; Dalton v. Chicago, R. I. & P. R. Co. 114 Iowa, 257, 86 N. W. 273; Hutcherson v. Louisville & N. R. Co. 21 Ky. L. Rep. 733, 52 S. W. 956; Missouri, K. & T. R. Co. v. Texas, 35 Tex. Civ. App. 604, 81 S. W. 589; McGovern v. Smith, 73 Vt. 52, 50 Atl. 549; Clark v.

Smith, 72 Vt. 138, 47 Atl. 391; Southern R. Co. v. Winchester, 127 Ky. 144, 105 S. W. 167.

Whether or not a signal was given by the approach of a train to a station or crossing on a certain occasion, cannot be shown or proven by the conduct of those in charge of some other train, or some other occasion. Eskridge v. Cincinnati, N. O. & T. P. R. Co. 89 Ky. 367, 12 S. W. 581; Findley Brewing Co. v. Bauer, 50 Ohio St. 560, 35 N. E. 55.

Verdict cannot be based upon speculation or conjecture. Satterberg v. Minneapolis, St. P. & S. Ste. M. R. Co. 19 N. D. 38, 121 N. W. 70; Rev. Codes 1905, §§ 7686–7691; Louisville, N. A. & C. R. Co. v. Goodykoontz, 119 Ind. 111, 12 Am. St. Rep. 371, 21 N. E. 472.

In computing damages for wrongful death, only pecuniary loss to beneficiaries can be considered. Brady v. Chicago, 4 Biss. 448, Fed. Cas. No. 1,796; Hollyday v. Reeves, 5 Hughes, 89, Fed. Cas. No. 6,625; Conant v. Griffin, 48 Ill. 410; Illinois C. R. Co. v. Baches, 55 Ill. 379; Lake Shore & M. S. R. Co. v. Sunderland, 2 Ill. App. 307; Lake Shore & M. S. R. Co. v. Ouska, 51 Ill. App. 334; Armour v. Czischki, 59 Ill. App. 17; Gunderson v. Northwestern Elevator Co. 47 Minn. 161, 49 N. W. 694; Schaub v. Hannibal & St. J. R. Co. 106 Mo. 74, 16 S. W. 924; Wise v. Peerpenning, 2 Edm. Sel. Cas. 112; Oldfield v. New York & H. R. Co. 14 N. Y. 310; Lehman v. Brooklyn, 29 Barb. 234; Mitchell v. New York C. & H. R. R. Co. 2 Hun, 535; Hall v. Crain, 2 Ohio Dec. Reprint, 453, 3 Ohio L. J. 137; Pennsylvania R. Co. v. Vandever, 36 Pa. 298; Caldwell v. Brown, 53 Pa. 453; March v. Walker, 48 Tex. 372; McGown v. International & G. N. R. Co. 85 Tex. 289, 20 S. W. 80; Galveston, H. & S. A. R. Co. v. Worthy, 87 Tex. 459, 29 S. W. 376; Gulf, C. & S. F. R. Co. v. Southwick, — Tex. Civ. App. —, 30 S. W. 592; Potter v. Chicago & N. W. R. Co. 21 Wis. 377, 94 Am. Dec. 548, 7 Am. Neg. Cas. 157; Richmond v. Chicago & W. M. R. Co. 87 Mich. 374, 49 N. W. 621; Duval v. Hunt, 34 Fla. 85, 15 So. 876, 13 Am. Neg. Cas. 848; Illinois C. R. Co. v. Crudupt, 63 Miss. 291; Baltimore & O. R. Co. v. State, 33 Md. 542; Baltimore & O. R. Co. v. State, 41 Md. 268; Cumberland & P. R. Co. v. State, 45 Md. 234; Philadelphia, W. & B. R. Co. v. State, 58 Md. 372; Baltimore & R. Turnp. Road v. State, 71 Md. 573, 18 Atl. 887; Galveston v. Barbour, 62 Tex. 174, 50 Am. Rep. 519; Inter-

national & G. N. R. Co. v. Ormond, 64 Tex. 490; Houston & T. C. R. Co. v. Cowser, 57 Tex. 293; Houston & T. C. R. Co. v. Nixon, 52 Tex. 19; Rev. Stat. art. 2909; Missouri P. R. Co. v. Lee, 70 Tex. 496, 7 S. W. 860; Swift v. Gaylord, 229 Ill. 330, 82 N. E. 300.

The burden is upon the plaintiff to give some clear, definite data upon which damages can be estimated. James v. Florida C. & P. R. Co. 115 Ga. 313, 41 S. W. 585; Potter v. Chicago & N. W. R. Co. 21 Wis. 373, 94 Am. Dec. 549, 7 Am. Neg. Cas. 157; Tilley v. Hudson River R. Co. 29 N. Y. 252, 86 Am. Dec. 297; Chicago, R. I. & P. R. Co. v. Hambel, 2 Neb. (Unof.) 607, 89 N. W. 643; Chicago, St. P. M. & O. R. Co. v. Lagerkrans, 65 Neb. 566, 91 N. W. 358, 95 N. W. 2, distinguished; Crabtree v. Missouri P. R. Co. 86 Neb. 33, 136 Am. St. Rep. 663, 124 N. W. 932; Valente v. Sierra R. Co. 151 Cal. 534, 91 Pac. 481; Rhoads v. Chicago & A. R. Co. 227 Ill. 328, 11 L.R.A.(N.S.) 623, 81 N. E. 371, 10 Ann. Cas. 113; Pierce, Railroads, 393–399, and cases cited; Franklin v. Southeastern R. Co. 3 Hurlst. & N. 211, 4 Jur. N. S. 565, 6 Week. Rep. 573; Dalton v. Southeastern R. Co. 4 C. B. N. S. 296, 4 Jur. N. S. 711, 27 L. J. C. P. N. S. 227, 6 Week. Rep. 574; Pennsylvania R. Co. v. Books, 57 Pa. 339, 98 Am. Dec. 229; Little Rock & Ft. S. R. Co. v. Townsend, 41 Ark. 382; Fordyce v. McCants, 51 Ark. 509, 4 L.R.A. 296, 14 Am. St. Rep. 69, 11 S. W. 695; Galveston, H. & S. A. R. Co. v. Davis, 4 Tex. Civ. App. 468, 23 S. W. 301; Richmond v. Chicago & W. M. R. Co. 87 Mich. 374, 49 N. W. 621; Toledo, W. & W. R. Co. v. Asbury, 84 Ill. 429; Hall v. Galveston, H. & S. A. R. Co. 39 Fed. 18; Illinois C. R. Co. v. Baches, 55 Ill. 379; Missouri P. R. Co. v. Lee, 70 Tex. 496, 7 S. W. 857; Staal v. Midland R. Co. 57 Mich. 239, 23 N. W. 795; Blake v. Midland R. Co. 18 Q. B. 93, 21 L. J. Q. B. N. S. 233, 16 Jur. N. S. 562; Duval v. Hunt, 34 Fla. 85, 15 So. 885, 13 Am. Neg. Cas. 848; Baltimore & R. Turnp. Road v. State, 71 Md. 573, 18 Atl. 884; Baltimore & O. R. Co. v. State, 33 Md. 542, 41 Md. 268; Barron v. Northern P. R. Co. 16 N. D. 277, 113 N. W. 102; Sedgw. Damages, 180, 483; Smith v. Evans, 13 Neb. 314, 14 N. W. 406; Esterly Harvesting Mach. Co. v. Frolkey, 34 Neb. 110, 51 N. W. 594; Galveston, H. & S. A. R. Co. v. Thornsberry, — Tex. —, 17 S. W. 521, 6 Am. Neg. Cas. 610, 5 Am. & Eng. Enc. Law, 718; Scherer v. Schalberg, 18 N. D. 421, 24 L.R.A.(N.S.) 520,

122 N. W. 1000; Spicer v. Northern P. R. Co. 21 N. D. 61, 128 N. W. 302.

Melvin A. Hildreth, for respondent.

Errors not discussed, and to which the attention of the court is not directly called in appellant's brief, are abandoned. Flora v. Mathwig, 19 N. D. 5, 121 N. W. 63.

The denying of the motion for a new trial or for judgment notwithstanding the verdict is not assigned as error in the record, and this court ought not to review the case. State v. Wright, 20 N. D. 216, 126 N. W. 1023, Ann. Cas. 1912 C, 795; Rule 14, 10 N. D. XLVI, 91 N. W. VIII; Acton v. Fargo & M. Street R. Co. 20 N. D. 434, 129 N. W. 225; Sucker State Drill Co. v. Brock, 18 N. D. 532, 123 N. W. 667.

The case was properly submitted to the jury, and by the verdict, every fact and inference has been settled in favor of the plaintiff. The negligence of the defendant, as the proximate cause of the injury, is fully established. Anderson v. Minneapolis, St. P. & S. Ste. M. R. Co. 18 N. D. 463, 123 N. W. 281; Union Stock-Yards v. Conoyer, 41 Neb. 617, 59 N. W. 950; Phillips v. Milwaukee & N. R. Co. 77 Wis. 349, 9 L.R.A. 521, 46 N. W. 543; Kern v. Snider, 76 C. C. A. 201, 145 Fed. 327; Weiler v. Manhattan R. Co. 53 Hun, 372, 6 N. Y. Supp. 320, 5 Am. Neg. Cas. 472, affirmed in 127 N. Y. 669, 28 N. E. 255; Adams v. Bunker Hill & S. Min. Co. 12 Idaho, 637, 11 L.R.A.(N.S.) 846, 89 Pac. 624; Solberg v. Schlosser, 20 N. D. 315, 30 L.R.A.(N.S.) 1111, 127 N. W. 91; Northern P. R. Co. v. Everett, 152 U. S. 107, 38 L. ed. 373, 14 Sup. Ct. Rep. 474; Daily v. New York, N. H. & H. R. R. Co. 167 Fed. 600; Hall v. Northern P. R. Co. 16 N. D. 60, 111 N. W. 609, 14 Ann. Cas. 960; Higgs v. Minneapolis, St. P. & S. Ste. M. R. Co. 16 N. D. 447, 15 L.R.A.(N.S.) 1162, 114 N. W. 722, 15 Ann. Cas. 97; Henavie v. New York C. & H. R. R. Co. 166 N. Y. 280, 59 N. E. 901, 9 Am. Neg. Rep. 345; Dyer v. Erie R. Co. 71 N. Y. 228, 12 Am. Neg. Cas. 347; Houghkirk v. Delaware & H. Canal Co. 92 N. Y. 219, 44 Am. Rep. 370; Thompson v. New York C. & H. R. R. Co. 110 N. Y. 636, 17 N. E. 690; Vandewater v. New York & N. E. R. Co. 135 N. Y. 583, 18 L.R.A. 771, 32 N. E. 636.

Where the evidence of negligence is in doubt, or where different

minds might draw different conclusions from all of the testimony, the case is one for the jury. McNamara v. New York C. & H. R. R. Co. 136 N. Y. 650, 32 N. E. 765; Wilson v. Southern P. R. Co. 62 Cal. 164; Painton v. Northern C. R. Co. 83 N. Y. 8; 2 Thomp. Neg. §§ 1697, 1699, 1700; Patterson, R. Acci. Law, p. 156, and cases cited in foot notes. See pages 166, 167; Kunkel v. Minneapolis, St. P. & S. Ste. M. R. Co. 18 N. D. 377, 121 N. W. 830.

Where a party can offer proof of facts which would rebut the inferences which are already established, and fails to do so, the natural inference is that such proof, instead of rebutting, would be supporting the inferences against him. Pennsylvania R. Co. v. Anoka Nat. Bank, 47 C. C. A. 454, 108 Fed. 482; Union Trust Co. v. McClellan, 40 W. Va. 405, 21 S. E. 1025; 1 Moore, Facts, §§ 556–564.

It is to be presumed that plaintiff, on the night in question, was exercising ordinary care and diligence for his own protection. Kunkel v. Minneapolis, St. P. & S. Ste. M. R. Co. 18 N. D. 380, 121 N. W. 830; Chicago, M. & St. P. R. Co. v. Donovan, 87 C. C. A. 600, 160 Fed. 826; Kern v. Snider, 145 Fed. 328, 76 C. C. A. 201; Missouri, K. & T. R. Co. v. Byrne, 40 C. C. A. 402, 100 Fed. 362; Big Bushy Coal & Coke Co. v. Williams, 99 C. C. A. 102, 176 Fed. 529; Chicago & N. W. R. Co. v. Netolicky, 14 C. C. A. 615, 32 U. S. App. 168, 406, 67 Fed. 668; Shaber v. St. Paul, M. & M. R. Co. 28 Minn. 103, 9 N. W. 578; Bolinger v. St. Paul & D. R. Co. 36 Minn. 418, 1 Am. St. Rep. 680, 31 N. W. 856; Loucks v. Chicago, M. & St. P. R. Co. 31 Minn. 526, 18 N. W. 651; Grant v. Oregon R. & Nav. Co. 54 Wash. 678, 25 L.R.A.(N.S.) 925, 103 Pac. 1126; Delaware, L. & W. R. Co. v. Converse, 139 U. S. 469, 35 L. ed. 213, 11 Sup. Ct. Rep. 569; Watertown v. Greaves, 56 L.R.A. 865, 50 C. C. A. 172, 112 Fed. 183; McGhee v. Campbell, 42 C. C. A. 94, 101 Fed. 936; St. Louis, I. M. & S. R. Co. v. Leftwich, 54 C. C. A. 1, 117 Fed. 127, 12 Am. Neg. Rep. 395; Hemingway v. Illinois C. R. Co. 52 C. C. A. 477, 114 Fed. 843; Texas & P. R. Co. v. Carlin, 60 L.R.A. 462, 49 C. C. A. 605, 111 Fed. 777; Patterson, Railway Acci. Law, 166, 167; Gray v. Chicago, R. I. & P. R. Co. 143 Iowa, 268, 121 N. W. 1099; Liabraaten v. Minneapolis, St. P. & S. Ste. M. R. Co. 105 Minn. 207, 117 N. W. 423; Mason v. Lansing & J. R. Co. 157 Mich. 1, 129 N. W. 468; Bruggeman v. Illinois C. R. Co. 147 Iowa, 187, 123 N. W. 1007;

Stotelmeyer v. Chicago, M. & St. P. R. Co. 148 Iowa, 278, 127 N. W. 205; Stewart v. Hall, 150 Iowa, 744, 130 N. W. 994; Nilson v. Chicago, B. & Q. R. Co. 84 Neb. 595, 121 N. W. 1128; Kafka v. Union Stock-Yards Co. 87 Neb. 331, 127 N. W. 129; Solberg v. Schlosser, 20 N. D. 307, 30 L.R.A.(N.S.) 1111, 127 N. W. 91; Whaley v. Vidal, 27 S. D. 627, 132 N. W. 245; Tietz v. Grand Trunk R. Co. 166 Mich. 205, 131 N. W. 710; Klotz v. Winona & St. P. R. Co. 68 Minn. 341, 71 N. W. 257; Cooper v. Lake Shore & M. S. R. Co. 66 Mich. 261, 33 N. W. 306; McKenna v. Baessler, 86 Iowa, 197, 17 L.R.A. 310, 53 N. W. 104; 2 Thomp. Neg. § 1506, p. 183; see 6 Thomp. Neg. § 7390, p. 430; Great Northern R. Co. v. McLaughlin, 17 C. C. A. 330, 44 U. S. App. 189, 70 Fed. 669; Dwyer v. St. Louis & S. F. R. Co. 52 Fed. 88; Haugen v. Chicago, M. & St. P. R. Co. 3 S. D. 394, 53 N. W. 769; Richardson v. Boston, 19 How. 263, 15 L. ed. 639; Frisbie v. Whitney, 9 Wall. 196, 19 L. ed. 672; Cork v. Blossom, 162 Mass. 330, 38 N. E. 476; Lehnertz v. Minneapolis & St. L. R. Co. 31 Minn. 219, 17 N. W. 376; Madden v. Minneapolis & St. L. R. Co. 30 Minn. 453, 16 N. W. 263; Chicago & A. R. Co. v. Adler, 56 Ill. 344; Ohio & M. R. Co. v. People, 45 Ill. App. 583; 5 Enc. Pl. & Pr. 691–693.

Where a party objects to testimony, he must at all times maintain a hostile attitude towards such testimony. See Abbott, Civil Jury Trials, 3d ed. 323; Missouri P. R. Co. v. Bentley, 78 Kan. 221, 93 Pac. 150, 96 Pac. 800; Miller v. Miller, 92 Va. 510, 23 S. E. 891; Jenkins v. Salmon Brick & Lumber Co. 120 La. 549, 45 So. 435; Virginia & T. Coal & I. Co. v. Fields, 94 Va. 102, 26 S. E. 426; New York L. Ins. Co. v. Taliaferro, 95 Va. 522, 28 S. E. 879; Southern R. Co. v. Hansbrough, 107 Va. 733, 60 S. E. 58; Tacoma Light & Water Co. v. Huson, 13 Wash. 124, 42 Pac. 536; Wees v. Page, 47 Wash. 213, 91 Pac. 766; King v. Haney, 46 Cal. 561, 13 Am. Rep. 217.

Present negligence cannot be predicated upon proof of prior acts of negligence. But where the testimony tends to show circumstances similar as to time and place, and as to conduct and conditions, it is competent, and is not collateral. Chicago & A. R. Co. v. Adler, 56 Ill. 344; Ohio & M. R. Co. v. People, 45 Ill. App. 583; 5 Enc. Pl. & Pr. 691–693; Northern P. R. Co. v. Patterson, 154 U. S. 134, 38 L. ed. 936, 14 Sup. Ct. Rep. 977; Gulf, C. & S. F. R. Co. v. Johnson,

4 C. C. A. 447, 10 U. S. App. 629, 54 Fed. 474; Berry v. Seawell, 13 C. C. A. 101, 31 U. S. App. 41, 65 Fed. 742; Field v. New York C. R. Co. 32 N. Y. 339; Quinlin v. Utica, 11 Hun, 217, 74 N. Y. 603; Chicago v. Powers, 42 Ill. 169, 89 Am. Dec. 418; Rich v. Chicago, M. & St. P. R. Co. 78 C. C. A. 663, 149 Fed. 79; Northern P. R. Co. v. Lewis, 2 C. C. A. 446, 7 U. S. App. 254, 51 Fed. 658; Grand Trunk R. Co. v. Richardson, 91 U. S. 469, 23 L. ed. 362; Ohio & M. R. Co. v. People, 45 Ill. App. 583; 5 Enc. Pl. & Pr. 691, and cases cited; Kent v. Lincoln, 32 Vt. 591; Kelly v. Southern Minnesota R. Co. 28 Minn. 98, 9 N. W. 588; Heinmiller v. Winston Bros. 131 Iowa, 32, 6 L.R.A.(N.S.) 150, 117 Am. St. Rep. 405, 107 N. W. 1102; Sheldon v. Hudson River R. Co. 14 N. Y. 218, 67 Am. Dec. 155; Payne v. Troy & B. R. Co. 83 N. Y. 572; Wolfkiel v. 6th Ave. R. Co. 38 N. Y. 49, 5 Am. Neg. Cas. 106; Webber v. New York C. & H. R. R. Co. 58 N. Y. 451; Hart v. Hudson River Bridge Co. 80 N. Y. 622; 1 Wigmore, Ev. p. 18, subdiv. D; Gale v. Schillock, 4 Dak. 182, 29 N. W. 661; Hayden v. Palmer, 2 Hill, 205; Robers v. Chicago & N. W. R. Co. 35 Wis. 684; Gillett, Indirect & Collateral Ev. pp. 86–88, and cases in foot notes; McCarragher v. Rogers, 120 N. Y. 532, 34 N. E. 812; District of Columbia v. Armes, 107 U. S. 519, 27 L. ed. 618, 2 Sup. Ct. Rep. 840; Indianapolis & St. L. R. Co. v. Stout, 53 Ind. 143; Judson v. New York & N. H. R. Co. 29 Conn. 434; Maltby v. Chicago & W. M. R. Co. 52 Mich. 108, 17 N. W. 717; Brown v. Chicago & N. W. R. Co. 102 Wis. 137, 44 L.R.A. 579, 77 N. W. 748, 78 N. W. 771; Louisville, N. A. & C. R. Co. v. Smith, 91 Ind. 119; Pittsburg, Ft. W. & C. R. Co. v. Dunn, 56 Pa. 280; Baughman v. Shenango & A. N. R. Co. 92 Pa. 335, 37 Am. Rep. 690; Mann v. Central Vermont R. Co. 55 Vt. 484, 45 Am. Rep. 628; O'Connor v. Boston & L. R. Corp. 135 Mass. 352; Pennsylvania R. Co. v. Boylan, 104 Ill. 595; Wasmer v. Delaware, L. & W. R. Co. 80 N. Y. 212, 36 Am. Rep. 608; Oliver v. Northeastern R. Co. L. R. 9 Q. B. 409, 43 L. J. Q. B. N. S. 198; Milwaukee & C. N. R. Co. v. Hunter, 11 Wis. 160, 78 Am. Dec. 699; Johnson v. St. Paul & D. R. Co. 31 Minn. 283, 17 N. W. 622; Pittsburgh Southern R. Co. v. Taylor, 104 Pa. 306, 49 Am. Rep. 580; Paine v. Grand Trunk R. Co. 58 N. H. 611.

There is abundant evidence of the negligence of the defendant, and that such negligence was the proximate cause of the death of Rober.

Worth Bros. v. Kallas, 89 C. C. A. 186, 162 Fed. 308; 2 Thomp. Neg. §§ 1695–1697; Milton v. Bangor R. & Electric Co. 103 Me. 218, 15 L.R.A.(N.S.) 203, 125 Am. St. Rep. 293, 68 Atl. 826; See Code Civ. Proc. § 4295; Gray v. Chicago, R. I. & P. R. Co. 143 Iowa, 268, 121 N. W. 1099; Korab v. Chicago, R. I. & P. R. Co. 149 Iowa, 711, 41 L.R.A.(N.S.) 32, 128 N. W. 531; Liabraaten v. Minneapolis, St. P. & S. Ste. M. R. Co. 105 Minn. 207, 117 N. W. 423; Merrill v. Minneapolis & St. L. R. Co. 27 S. D. 1, 129 N. W. 468; Bruggeman v. Illinois C. R. Co. 147 Iowa, 187, 123 N. W. 1007; Stotelmeyer v. Chicago, M. & St. P. R. Co. 148 Iowa, 278, 127 N. W. 205; Knudson v. Great Northern R. Co. 114 Minn. 244, 130 N. W. 994; Nilson v. Chicago, B. & Q. R. Co. 84 Neb. 595, 121 N. W. 1128; Kafka v. Union Stock-Yards Co. 87 Neb. 331, 127 N. W. 129; Solberg v. Schlosser, 20 N. D. 307, 30 L.R.A.(N.S.) 1111, 127 N. W. 91; Whaley v. Vidal, 27 S. D. 627, 132 N. W. 245; Tuetz v. Grand Trunk R. Co. 166 Mich. 205, 131 N. W. 710; Klotz v. Winona & St. P. R. Co. 68 Minn. 341, 71 N. W. 257, 3 Am. Neg. Rep. 201; Cooper v. Lake Shore & M. S. R. Co. 66 Mich. 261, 11 Am. St. Rep. 482, 33 N. W. 306; McKenna v. Baessler, 86 Iowa, 197, 17 L.R.A. 310, 53 N. W. 104; 2 Thomp. Neg. § 1506; Great Northern R. Co. v. McLaughlin, 17 C. C. A. 330, 44 U. S. App. 189, 70 Fed. 669; Dwyer v. St. Louis & S. F. R. Co. 52 Fed. 88; Haugen v. Chicago, M. & St. P. R. Co. 3 S. D. 394, 53 N. W. 769; Richardson v. Boston, 19 How. 263, 15 L. ed. 639; Frisbie v. Whitney, 9 Wall. 196, 19 L. ed. 672.

The evidence is ample to show the expectancy or value of the life of deceased to those entitled to benefits. Ruehl v. Lidgerwood Rural Teleph. Co. 23 N. D. 6, 133 N. W. 793; State v. Waholz, 28 Minn. 114, 9 N. W. 578; Satterberg v. Minneapolis, St. P. & S. Ste. M. R. Co. 19 N. D. 39, 121 N. W. 70; Tiffany, Death by Wrongful Act, 224–226.

Where no prejudicial error exists, and where the questions of fact have been properly submitted to the jury, and a verdict rendered, and a motion for a new trial heard before the trial court and denied, the order of the trial court should not be disturbed. MacGregor v. Pierce, 17 S. D. 51, 95 N. W. 281; Herrimen v. Menzies, 115 Cal. 16, 35 L.R.A. 318, 56 Am. St. Rep. 81, 44 Pac. 660, 46 Pac. 730; Cooney v. Furlong, 66 Cal. 520, 6 Pac. 388; Packer v. Doray, 98 Cal. 315, 33 Pac. 118.

BRUCE, J. (after stating the facts as above). Appellant relies upon four propositions for a reversal of this judgment: (1) That there was no proof of negligence on the part of the defendant; (2) that there is proof of contributory negligence; (3) that the proof offered does not in any way justify the awarding of anything but nominal damages; (4) that the evidence in relation to the switch engine which was seen by the hackman at about 10 o'clock and probably an hour prior to the accident was improperly admitted.

On the first two objections it is argued that there is evidence which tends to show that a man could have been seen on the night in question at a distance of 30 feet, and that the outlines of a box car could have been seen from 150 to 200 feet. The proof, however, also shows that the night was very cold and stormy, and that a strong wind was blowing with a velocity of from 30 to 45 miles an hour, and that dust and gravel and *débris* were in the air; the thermometer registered 18 degrees below zero; the yards were not lighted. There is also evidence that at about 10 o'clock a hackman drove close to an engine upon the track, which the evidence strongly tends to show was the one which ran over the deceased, without even seeing the same or hearing any bell or signal sounded. There is also evidence that blood was found upon the wheels and tender of a switch engine of the defendant the next morning. On the other hand, the engineer testified that there were lights on both ends of his engine, and that he sounded his bell whenever he passed the crossing. We do not believe that this evidence overcomes the presumption of ordinary care which is based upon the instinct of self-preservation. Kunkel v. Minneapolis, St. P. & S. Ste. M. R. Co. 18 N. D. 367, 121 N. W. 830, and cases there cited, 1 Moore, Facts, §§ 554, 555; Hanlon v. Milwaukee Electric R. & Light Co. 118 Wis. 210, 95 N. W. 100. It is true that this presumption does not overcome direct, probative evidence, but as we view the case, there is nothing in the record which rises to the dignity of such.

The plaintiff's intestate was killed on the crossing of a public highway, and within the limits of the city. There is no real dispute upon this question. The mangled remains of the body, and the clothes found in the frog in the highway, is sufficient evidence of this. The presumption of the law is that a man has not committed suicide, and therefore that the deceased did not voluntarily throw himself upon the track.

Soules v. Brotherhood of American Yeomen, 19 N. D. 23, 120 N. W. 760; Schraeder v. Modern Brotherhood, 90 Neb. 688, 39 L.R.A.(N.S.) 157, 134 N. W. 266; Walden v. Bankers' Life Asso. 89 Neb. 546, 131 N. W. 962; 1 Moore, Facts, § 651. So, too, there is no presumption that anyone else committed a crime, that is to say, killed him and placed his body upon the track. There is a presumption of due care on his part arising out of the instinct of self-preservation. Kunkel v. Minneapolis, St. P. & S. Ste. M. R. Co. supra; Cameron v. Great Northern R. Co. 8 N. D. 134, 77 N. W. 1016, 5 Am. Neg. Rep. 454. There is also, and above all, a duty on the part of the railway company to keep a proper lookout at a highway crossing, especially within the limits of cities. Coulter v. Great Northern R. Co. 5 N. D. 568, 67 N. W. 1046; Bishop v. Chicago, M. & St. P. R. Co. 4 N. D. 536, 62 N. W. 605; St. Louis Southwestern R. Co. v. Dingman, 62 Ark. 245, 35 S. W. 219. The engineer of the switch engine, which, as we view the evidence, must have occasioned the death of the deceased, or which, at any rate, was running up and down the track all night long and repeatedly crossed the crossing in question at and about the time when the accident must have occurred, testified that he knew nothing about the facts of the case at all, and did not know that the deceased had been run over until informed by someone else, some hour or so after the accident. The case, in our mind, was one for the jury to pass upon (Kunkel v. Minneapolis, St. P. & S. Ste. M. R. Co. supra; Anderson v. Minneapolis, St. P. & S. Ste. M. R. Co. 18 N. D. 463, 123 N. W. 281; St. Louis Southwestern R. Co. v. Dingman, 62 Ark. 245, 35 S. W. 219). If the accident had taken place between highway crossings, and upon the open prairie, where there was no absolute duty to ring a bell or to keep a proper lookout, and where the deceased would probably have been a trespasser, the case might have been different.

But counsel for defendant and appellant argues that improper evidence was admitted, and that much of the evidence which is urged in support of the verdict was inadmissible. He objected and still objects strenuously to the introduction of the testimony of the hackman, Chapin, to the effect that at some time and about 10 o'clock he saw a switch engine upon the track at the crossing, without a tail light; that this engine almost ran into him, and that he heard no bell or gong sounded. It is urged, in short, that proof of prior negligence cannot be had in

support of an allegation of negligence at a particular time. We must remember, however, that in the case at bar practically all the evidence is, or should be, in the possession of the defendant. The victim of the accident is dead. The evidence is to us conclusive that he was run over by a switch engine belonging to the defendant company. The question to be decided was not merely whether the defendant failed to ring a bell at the crossing at the time of the accident, or whether it had a tail light upon its engine, but what was the cause of the accident, and was there evidence to overcome the presumption of due care on the part of the deceased. It was claimed that the deceased could see the engine at a distance of 150 to 200 feet. The hackman was allowed to testify that he almost ran upon an engine without seeing it. It was claimed by the defendant that the bell was sounded at the crossing, and could have been heard by the deceased. It is shown that a strong wind was blowing, and it is sought to be proved by the plaintiff that the hackman was almost run into by an engine, without hearing any gong sounded. All of this evidence was admissible as tending to show the physical facts attending the accident. Not merely was this evidence admissible on the question of contributory negligence and as to whether the deceased could have seen and heard the engine in the storm or not, but for the purpose of arriving at the real cause of the accident. There were no eyewitnesses to the accident, and proof of this nature is the only proof that could be adduced, unless the defendant himself chose to furnish better evidence. This is not a case where negligent acts on other parts of the road or on other occasions, or committed by other engineers than those involved in the accident, are concerned, but a case in which the acts and conduct of the engineers and servants, and the physical equipment of the engine engaged in the same general switching transaction in which the injury occurred, are involved. We think the evidence was admissible. See Chicago v. Powers, 42 Ill. 169, 89 Am. Dec. 418; Rich v. Chicago, M. & St. P. R. Co. 78 C. C. A. 663, 149 Fed. 79; Northern P. R. Co. v. Lewis, 2 C. C. A. 446, 10 U. S. App. 254, 51 Fed. 658; Grand Trunk R. Co. v. Richardson, 91 U. S. 469, 23 L. ed. 362; Cotner v. St. Louis & S. F. R. Co. 220 Mo. 284, 119 S. W. 610; Woodward v. Southern R. Co. 90 S. C. 262, 73 S. E. 79; State v. Manchester & L. R. Co. 52 N. H. 528, 548; Davidson v. St. Paul, M. & M. R. Co. 34 Minn. 51, 24 N. W. 324; Swadley v. Missouri P. R. Co. 118 Mo. 268, 40 Am. St.

Rep. 366, 24 S. W. 140; Aurora v. Brown, 12 Ill. App. 122 (affirmed in 109 Ill. 165); Goodwin v. Atlantic Coast Line R. Co. 82 S. C. 321, 64 S. E. 242; Lannis v. Louisville R. Co. 16 Ky. L. Rep. 446; Field v. New York C. R. Co. 32 N. Y. 339; Pennsylvania Teleph. Co. v. Varnan, 2 Monaghan (Pa.) 645, 15 Atl. 624; Quinlan v. Utica, 11 Hun, 217; Presby v. Grand Trunk R. Co. 66 N. H. 615, 22 Atl. 554; Galveston, H. & S. A. R. Co. v. Kutac, 76 Tex. 473, 13 S. W. 327; Bourassa v. Grand Trunk R. Co. 75 N. H. 359, 74 Atl. 590.

We now come to the proof of the damages. Appellant insists that since no mortality tables were introduced, there is no proof of the expectancy of life either of the deceased or of his relatives. As we understand the law, and as held by this court in the case of Ruehl v. Lidgerwood Rural Teleph. Co. 23 N. D. 6, — L.R.A.(N.S.) —, 135 N. W. 793, the admission in evidence of such tables is not necessary to a recovery of substantial damages. According to the common law, standard tables were competent and proper evidence, but they were not absolutely necessary. Under § 7303 of the Code of North Dakota, the Carlisle tables are admissible, but their admission is not necessary. We have discussed this question at some length in the case of Ruehl v. Lidgerwood Rural Teleph. Co. before referred to, and we believe that no extended discussion is necessary here. We know that counsel for the appellant makes a distinction between a case where the expectancy of the life of the deceased and the expectancy of the life of the beneficiary are concerned, but we can find no such distinction in the authorities. We have examined the cases cited by appellant, and the case of Rhoads v. Chicago & A. R. Co. 227 Ill. 328, 11 L.R.A.(N.S.) 623, 81 N. E. 371, and the notes to that case as reported in 10 Ann. Cas. 111, 113, and can find no support for the proposition. All that the cases hold is that there must be some proof of a pecuniary loss to the beneficiaries, and that in such cases mortality tables are competent evidence. All that the case of Rhoads v. Chicago & A. R. Co. supra, held was that in a case where the mortality tables had been introduced it was error for the court to instruct the jury that a father was entitled to a sum equal to the earnings of his son during the son's expectancy of life, when the tables showed that the life of the son would have been twenty-eight years longer than that of his father. In other words, the court held that all the father could possibly recover would be a sum equal to the support that he

would receive from his son during his, the father's, life. We have, indeed, examined the Illinois Reports with a great deal of care, and we have yet to find a case in which a judgment has been set aside because of the failure to introduce mortality tables in evidence. It is well established, indeed, as we have shown in the Ruehl Case, that the court may itself take judicial notice of such mortality tables. It is also well established that the things of which a court may take judicial notice are things which are generally known. Taking judicial notice, as we do, and may, of the Carlisle expectancy tables and of the expectancy of life of the deceased, which was 37.14 years; of the father, which was 18.97 years; and of the mother, which was 22.50 years if we put her age at 48; of the youngest child, which was 45 years; and of the next child, which was 42.17 years; and considering the earning capacity of the deceased, shown on the trial, we are not prepared to say that the verdict was excessive, or that only nominal damages should have been awarded. Little v. Bousfield & Co. 165 Mich. 654, 131 N. W. 63.

But defendant and appellant says that there is no proof of any pecuniary loss on which a recovery can be based, even if the mortality tables had been introduced or were unnecessary. Counsel argues that there is no direct proof as to the money contributed by the son to his family, or of the monetary condition and needs of that family. We do not so understand the evidence. We have held in the case of Satterberg v. Minneapolis, St. P. & S. Ste. M. R. Co. 19 N. D. 38, 121 N. W. 70, that a legal obligation to support is not necessary to a recovery in such cases. The evidence shows that the boy's earning capacity was about $4 a day; that he was in business with his father; and that he and his father made no division of the profits, but turned all of their earnings into the family fund. The evidence shows that the father was fifty-three years of age, and we must infer that the mother was at least forty-six. There was a girl of fifteen years of age, and a boy of about nineteen. The earning capacity of the family as a whole was not, it is true, shown, but it was shown that the father and son were both carpenters and concrete makers and in what may be termed the poorer class of society. In fact, the evidence conclusively shows that all of the earnings were turned into a joint fund for the family support. We think that the evidence was sufficient to warrant the recovery of substantial dam-

ages, and that the amount recovered ($2,000) should not, under the circumstances, be deemed in any way excessive.

The judgment of the District Court is affirmed.

SPALDING, Ch. J. This case is governed on the merits by Kunkel v. Minneapolis, St. P. & S. Ste. M. R. Co. 18 N. D. 367, 121 N. W. 830, and inasmuch as that states the law of this jurisdiction, I concur.

On Petition for Rehearing.

BRUCE, J. Counsel for appellant files a sweeping petition for rehearing, alleging that the opinion in chief "is in decided conflict with, and ignores controlling decisions of, this court. That it is based upon errors of law and errors of fact, upon omissions of material facts and misleading statements of fact; that it appears that it was rendered hastily, and that the facts as shown by the record were not carefully considered." When we come to a specification of the errors alleged to have been committed by the court, however, we find that they revolve around its conclusion as to contributory negligence, its allegation that the night was stormy and that such storm was of any moment; that there was proof by which the jury might find negligence in the case; that the fact that the defendant had introduced no evidence was of any moment; that the opinion of the court was based upon the assumption that the witness, Chapin, saw the switch engine testified to at 11:15 o'clock, and not at 10:20 o'clock, P. M.; that evidence of a switch engine passing the crossing at 10:20 without a light was not admissible; that the court arbitrarily assumed that decedent's mother's age was forty-six years, and that the court held that damages could be based on the total life expectancy, not merely of the deceased, but of his beneficiaries.

From the petition we now assume that counsel for appellant concedes that expectancy tables are not necessary to be introduced in such cases. He says: "We will assume, for the sake of argument, that no expectancy tables are necessary in cases of this kind, although we venture to predict that the loose practices thereby permitted will be of untold harm." If such is the result, this court cannot possibly be charged with inaugurating the custom or with overruling the established principles of the past. As stated in the opinion, we have yet to find, and

counsel for appellant has not been able to point out, any authorities which make that introduction necessary. When introduced they are introduced as an aid to the jury, and not on the theory that without their introduction the jury would have been unable to act. "While various forms of life tables are usually used for the purpose of assisting the jury in estimating the expectation of life, they are not essential. The jury may make their estimate from the other evidence as to the age, health, habits, and physical condition of plaintiff." 13 Cyc. 198. See also cases cited in original opinion and in Ruehl v. Lidgerwood Rural Teleph. Co. 23 N. D. 6, — L.R.A.(N.S.) —, 135 N. W. 793.

Counsel, we know, criticizes the court for assuming that the mother of the deceased must have been forty-six years of age, and for then stating that if she was forty-eight years of age, her expectancy of life would be 22.50 years. "It has," he says, "been our experience that men sometimes marry women of all ages; and how the court can deliberately find the age of a person, and arbitrarily insert that age in the record, and then figure out the mother's expectancy, so as to arrive at what her damages would have been by reason of the death of her son, is beyond our ken." The answer to this is that the court did not assess any damages in this case. It merely stated the life expectancy of the different parties interested. It did not even, as counsel inferred, suggest or hint that the plaintiff would be entitled to a recovery which would be based upon the entire life expectancy of any or all of the relatives of the deceased, or of the deceased, or that any allowance could be made in regard to the minors after they had reached the age of twenty-one. It merely stated what the tables would have proved if they had been introduced, as being something of which the court might take judicial notice. In our opinion, indeed, the exact age of the mother is immaterial. If she had married the father of the deceased when at the age of fifteen, or, on the other hand, at the age of thirty, it would have made no difference in our conclusion. The jury were justified at any rate in finding that she had some expectancy. In our opinion the verdict of the jury is abundantly sustained on the basis of damages to the father and the minor brothers and sisters, alone, and we can exclude the mother from the case altogether. Sieber v. Great Northern R. Co. 76 Minn. 269, 79 N. W. 95. It is not the habit of courts to set aside verdicts of this kind, for reasons of this kind. "To justify interference by the court

with the verdict of the jury, it must appear that some rule of law has been violated, or else that the verdict is so excessive or grossly inadequate as to indicate partiality, passion, or prejudice." 13 Cyc. 376. The trial court committed no error in regard to the age of the mother. The matter was not submitted by any instruction to the jury. We can see no evidence of passion or prejudice, nor any violation of law, or that the self-evident truth which we stated in our opinion has any effect on the case.

Counsel for appellant charges that on the question of contributory negligence of the deceased the court erred in "overruling controlling decisions. Also, its conclusion is based on an erroneous and misleading statement of fact." "Even if we were to assume that the statements in the opinion as to the night being 'stormy' are true," counsel says, "we still have a condition existing that anyone who cared to use his eyes could see, one who cared to look on that night could see a box car from a distance of 150 to 200 feet,—this with the cold wind and everything else. What possible difference, we ask, can it make how cold the night was, or how great was the velocity of the wind, or even how stormy it was, if, considering all these conditions, one could see a man 30 feet distant and a box car from a distance of 150 to 200 feet?" Why counsel is so reluctant to concede that the night was stormy we are unable to understand. The word "stormy" does not necessarily include either rain or snow, nor does the word "storm." It includes "a violent disturbance of the atmosphere, attended by wind, rain, snow, hail, or thunder and lightning. Storm is violent agitation or commotion of the elements by wind, etc., but not necessarily implying the fall of anything from the clouds." (Webster's International Dictionary.) The word "stormy" includes "agitated, with furious winds." (Ibid.) Whether snowing or not, the fact remains that it was bitterly cold; that a strong wind of the velocity of from 30 to 40 miles an hour was blowing. There is also evidence that sand and gravel and *débris* were flying in the air. Counsel says that "this court has already decided that the presumption of due care created where one has met death, no one seeing the accident, only arises where doubt exists as to the deceased's ability to see or hear the train or cars which caused his death." There is no doubt upon this proposition. But can we say, as a matter of law, that one battling against a storm and cold weather of this kind was necessarily negligent

because he did not see the outlines of a car or of an engine in time to avoid the accident? All the evidence as to sound and sight that there is is that when "one got on this crossing he could see down in the direction of the depot 150 or 200 feet by good electric light;" that "a man 125 feet south of the track would have an unobstructed view" of the same; that "a man standing at the crossing and looking down towards the depot could tell a man 30 feet away and the outlines of a box car 150 to 200 feet" away. It is argued, we know, that the wind was blowing in the direction of the deceased as he approached the track. If it was blowing in his direction as he approached the track it was not blowing in his direction when he was upon it. Nor is the blowing of the wind any conclusive argument. The deceased would naturally lower his head. If sand and dust and gravel were blowing (of which there is some evidence) he would probably be more or less blinded. A 30 to 40 mile wind, with the thermometer at 18 degrees below zero, is not a thing that is easy to be battled with. He had a right to rely on some degree of care on the part of the railway company. If he could have seen a man at 30 feet, or the outlines of a car at 150 feet, the men in charge of the railroad engine could have seen him. The mere fact that a wind is blowing towards a man is by no means conclusive as to the carriage of sound. It is a well-known physical fact that sound is not made more distinct in a gale than it is on a quiet evening. It is a matter of common knowledge that the rush and whistle of the wind and the beating of the wind against one's face and against one's ears has a tendency to interfere with, as a rule, rather than to aid, hearing. Not merely is the conveyance of sound impeded by a heavy storm, and the sound waves broken up by the turbulence of the air, but there is a confusion of sounds, and hearing is a psychological, as well as a physical, function. It is just as necessary to distinguish and disassociate as it is that an impression shall be made upon the eardrum. We are surrounded, in fact, by myriads of sounds, and hearing is merely discrimination and disassociation. "The jury," says the supreme court of Wisconsin in the case of Phillips v. Milwaukee & N. R. Co. 77 Wis. 349, 355, 9 L.R.A. 521, 46 N. W. 543, "may also very properly have considered the facts that it was a cold and stormy day, and that the deceased had a shawl about his head and ears, which might have interfered to some extent with his seeing as well as hearing. *It was not a day for taking ob-*

servations, but for keeping straight on. The employees of the road kept themselves protected from the weather on the engine, where they could not look out for these wild, detached cars that they had sent down the track, or warn the deceased of their approach. *These facts may well modify the rule that it was the duty of the deceased to look just at the time when the cars were near him.* It may be that he looked in that direction, but when these detached cars had not yet started on the side track. He is not here to be questioned as to what he did or did not do, and his conduct is entitled to all reasonable probabilities. One thing is certain,—that he did not know that these cars were creeping towards him and so near him when he undertook to cross the track. We think the jury might have properly found, as they did, that the deceased was not guilty of any want of ordinary care under the circumstances of the case that contributed to his death." In the case of Frederickson v. Iowa C. R. Co. — Iowa, —, 135 N. W. 12, we have a very similar case, and in it we find the following language: "It is said that the court should have held as a matter of law, that deceased was guilty of contributory negligence, but we cannot assent to the proposition. While the crossing in question was so open that the approach of a train could have readily been seen by the exercise of care under ordinary circumstances, the record shows that on the afternoon in question the wind was high, and that at times the air was so full of drifting snow that a person could not see far. What precaution the deceased may have taken when approaching this crossing cannot be certainly determined, but he had used it frequently for many years, and knew that it was dangerous to attempt to cross the track without exercising care; and the presumption that we have already referred to in connection with evidence of the condition of the weather at the time was, we think, sufficient to take the case to the jury." The only material difference in the cases is the fact that in the Iowa case there was evidence of flurries of snow, while in the case at bar there was evidence of flurries of sand and gravel and dust. When it comes to a matter of eyesight or hearing, we think few who are acquainted with the conditions in the western part of North Dakota would contend that one can hear or see better in a flurry of dust than he can in a flurry of snow. It is true that in the Iowa case there was some evidence that the statutory signals had not been given, and therefore, some evidence of negligence. There is, in the case at bar,

however, evidence from which the jury could infer negligence, also. We say this advisedly, as criticism was made in the petition for rehearing upon the statements of the opinion in chief. We did not, in that opinion, hold that anything was negligence as a matter of law. We were merely considering, and we are merely considering here, the question as to whether there was evidence from which the jury might infer negligence. It is to be remembered, too, in this case, that a verdict of the jury being rendered, it is for this court to resolve conflicts in the evidence in favor, rather than against, that verdict.

The complaint alleges negligence in maintaining an improperly guarded frog in the highway. That there was a frog in the highway is undisputed. It was not in the planking, but about 4 feet therefrom in the highway. The jury was perfectly justified, from the evidence, in holding that the deceased was caught in this frog, and even if headlights and tail lights were maintained upon the engines of the defendant, the condition of the crossing may still have been the proximate cause of the injury. Added to this was the testimony of the defendant's engineer that he did not see the deceased, and did not know of the accident at the time of its occurrence. The testimony shows that the highway was 80 feet in width. The planking was only 16 feet. The presumption is that the deceased was not guilty of contributory negligence, and that the instinct of self-preservation was in operation. The jury would have been perfectly justified from the evidence in holding that the deceased was caught in this frog, and even if headlights and tail lights were both maintained upon the engine, such fact may have been the proximate cause of the injury. It was for the jury to say whether, under the circumstances of the case, the defendant was negligent in running this engine across this crossing in the way that it did and on the night in question. Even if the deceased could have seen a box car 150 feet away, it does not follow by any means that it was negligence on his part to cross the tracks, nor when he has a perfect right to use the whole of the highway would it be presumed to be negligence for him, on a dark night and in a storm such as that which prevailed on the night in question, to walk on the side of the few feet of planking that was furnished. In McNamara v. New York C. & H. R. R. Co. 136 N. Y. 650, 32 N. E. 765, it was held that the testimony of a witness as to the ability of the deceased to see was not conclusive upon the jury, but merely an expression

of opinion. Even if we suppose that he could have seen an engine 150 or 200 feet away, there is no evidence or presumption that the engine was less than that distance from him, or even that distance from him when he attempted to cross the track. On this point, the fact that there were three men in the switching crew, and that the testimony of none of them is preserved, nor do the engineer or fireman testify upon the subject, is full of significance. If, when he reached the track, the engine first came within the 200-feet limit of sight, it is not unreasonable to suppose that plaintiff when he saw it started or jumped to one side. In doing so he might have been caught in the frog. He may have been walking in the full highway anyway as he had a right to do, and stumbled over the frog. A train running at the rate of 20 miles an hour would take less than 5 seconds to travel the distance of 150 feet, and less than 7 seconds to travel the distance of 200 feet. If it was running at the rate of 10 miles an hour it would take less than 11 seconds and 14 seconds, respectively. Can any one say, as a matter of law, that under the circumstances of the case contributory negligence is absolutely shown, or that an inference of negligence on the part of the defendant is not shown? It is alleged by counsel that a passenger train was due at about the same time, but where is there any testimony in the record from any member of that passenger crew? It was the duty of the passenger crew to keep a lookout at the crossing just as much as it was the duty of the men on the switch engine. Counsel for appellant wishes us to excuse defendant by the assumption of an accident, which, in itself, is by no means free from a suggestion of negligence. The rule of probabilities was laid down by the supreme court of Idaho in the case of Adams v. Bunker Hill & S. Min. Co. 12 Idaho, 637, 11 L.R.A. (N.S.) 844, 89 Pac. 624, as follows: "Where the evidence in a personal injury case is so uncertain as to leave it equally clear and probable that the injury resulted from any one of a number of causes that might be suggested, then, and in that case, a verdict for plaintiff would be pure speculation, and could not be sustained; but where the evidence, although circumstantial, is such that it would appear possible that the injury resulted from any one of several causes, and yet it points to the greater probability that it resulted from the specific cause charged by the plaintiff, a nonsuit should not be granted. In the latter case the jury would be justified in returning a verdict in favor of the plaintiff,

although it be possible that the injury may have resulted from some other cause. The law does not anticipate, or attempt to exclude mere possibilities. If upon any fair construction that a reasonable man might put upon the evidence, or any inference that might reasonably be drawn therefrom the conclusion of negligence can be arrived at or justified, then the defendant is not entitled to a nonsuit, but the question of negligence should go to the jury." In the case at bar the only theory of the accident, outside of the mere suggestion of contributory negligence from not looking for the car, and of the passage of the passenger train, is that the plaintiff crawled through the cars. All the evidence on this subject is the testimony of one of the witnesses that an engineer while switching cars stopped for about three minutes upon the crossing. The string of cars at the most, and at any time, was only from seven to ten cars in length. The time when the stop was made upon the crossing is not testified to, and is not connected with the time of the accident. It is admitted that there were three men in the switching crew, as well as the engineer and fireman. Is there any shadow of proof that at this time the plaintiff's decedent crawled beneath the cars, and is not the probability overwhelming that if he had attempted to do so, one of the four men would have seen him? The theory is so speculative that it is not worthy of consideration.

The evidence on this point was brought out on the examination of the witness Wordeman, the engineer of the switching engine, and is as follows:

Q. Did you at any time push five, six, or seven cars over the crossing that night?

A. No, sir. There were cars west of the crossing that night pushed by my engine. I took several cars. It might have been seven to ten. I have no way of finding out except how far we came. I pulled them up. My engine was facing east when I was pulling. I backed my engine up. It was some time about 9 o'clock when I pulled those cars up there. I cannot say that was the only time I pulled any cars up there. My engine was facing east and pulling a string of from seven to ten cars. I pulled over this crossing probably four or five times, I would say several times. I pulled over this crossing sometimes two and three or four car lengths.

Q. The times you pulled over the crossing, did you stop for any length of time?

A. Once we stopped for a few minutes.

Q. How much? Three minutes or four minutes, or how long?

A. I could not say. I did not look at my watch.

Q. Was it more than three minutes?

A. Might have been. I stood there some length of time. I will not swear that I was on that crossing five minutes. I will swear that I was on that crossing three minutes.

Q. What for?

A. I do not know.

By defendant: You were watching for signals from the switchmen while you were stopping on the crossing, weren't you?

A. Yes.

Prior to this time the witness had testified: "I tell the court that I run and switched that engine all that night back and forth across the crossing. I run my engine across the crossing that night. I cannot say when I first commenced to run across that crossing. It may have been at any time after 7 o'clock. I cannot tell this court at what hour I went across this crossing. It was exactly 12 o'clock when I left the engine. Up to the time I pulled the engine in and went to dinner, from 10 o'clock, I had been switching in that part of the yard and over this crossing at various times. I was throwing these cars back on the various tracks in the yard at various times as a switchman called upon me to switch them back. While doing this I had occasion at various times to pull up over this crossing, may be five or six times. During those times I would pull not exceeding five car lengths over the crossing."

Section 4320 of the Code provides that "all railway companies operating a line of railway in this state shall build or cause to be built and kept in good repair, good and sufficient crossings over such line at all points where any public highway in use is now or may hereafter be intersected by the same." Subdivision 2 of § 4321 provides that "plank shall be firmly spiked on and for the full length of the ties used in the roadbed of such railway where such crossing occurs, and shall be laid not more than 1 inch apart except where the rail prevents; the plank next inside of the rail shall not be more than 2½ inches from the inside

surface of such rail, and the plank used in the crossing shall not be less than 3 inches in thickness and so laid that the upper surface of the plank shall be on a level with the upper surface of the rail; *such plank shall extend all along the railway the entire width of the highway grade, and in no case less than 20 feet.*" The evidence is conclusive that this planking did not extend the whole width of the highway. Such being the case, the instruction of the court to the jury was perfectly proper which charged that "if you find by a preponderance of the evidence that a switch frog was constructed by the defendant railway company within the grade of the highway, within the grade of the street at the crossing at which the deceased was killed, if you find he was killed at such crossing, then it is for you to determine whether or not the construction and maintenance of such frog in a crossing within the grade of the highway or street is an act of negligence; that of itself would not entitle the plaintiff to recover in this action unless you are further satisfied by a preponderance of evidence that the erection and maintenance of such frog within the crossing and within the grade of the street was the proximate cause of the death of the deceased." These facts alone were sufficient to send the case to the jury. United States Brewing Co. v. Stoltenberg, 211 Ill. 531, 71 N. E. 1081, 17 Am. Neg. Rep. 193.

In the case of Korab v. Chicago, R. I. & P. R. Co. 149 Iowa, 711, 41 L.R.A.(N.S.) 32, 128 N. W. 529, the court said: "The admitted facts make it practically certain that deceased, while walking or running by the side of the moving train in the direction of the switch he was expected to close, stepped between the ends of the moving cars for some purpose not disclosed by the evidence, and, catching his foot in the unblocked guard, was quickly drawn under the wheels. There is no claim on the part of appellee that frogs or guards of this kind are not a source of peril to train men having occasion to walk over them in the performance of their duties, nor is it claimed that such peril may not be measurably removed or lessened by the use of blocks or wedges for that purpose. Indeed, it appears from appellee's evidence that blocks were formerly in use in its station yards, but for some reason not explained had for a considerable period been abandoned. Service of train men and switchmen in railway station yards is essentially dangerous at best; but it is incumbent upon the companies operating them to use reasonable care to make them as safe for their employees as is consistent

with the proper operation of their roads. In the making up of trains, and the handling, moving, and switching of cars, train men are required to walk upon and over the yard tracks at all times of the day and night; and ordinarily they must of necessity move with quickness and celerity from point to point, making it quite impossible that in every instance they should carefully survey their path, or give close attention to the planting of each footstep. They may rightfully depend, to some degree, upon their employers to perform their duty to keep the surface of the yards free from all perils not inherent in the reasonable construction of the road and prosecution of the business for which they are intended. . . . We are therefore of the opinion that upon the conceded facts a finding of the jury that defendant was negligent in failing to block or protect the frog in question would have sufficient support in the record. That the existence of the unblocked frog was the proximate cause, or at least a proximate cause, of the death of deceased, is too clear to require argument. The debatable ground in the case, and the one upon which we may assume the trial court felt compelled to hold against the right of recovery, is upon the question whether the appellant sufficiently negatived the existence of contributory negligence on part of the deceased. It is strenuously contended by appellee that there is no showing whatever of the reason or cause which led deceased to step between the cars upon the frog; that there is no evidence that in doing so he was acting in the line of his duty, or was in any manner using care for his own safety; but, on the contrary, the very fact that he did step into such place of danger shows conclusively his contributory negligence. Some of these propositions ignore rules which have been thoroughly settled by this court. *As has already been noted, no living witness appears to testify as to the acts,* movements, or conduct of the deceased from the time he disappeared in the direction of the switch until he met his death a brief moment later. At that time he was in the performance of his duty in the appellee's service, and there is no suggestion that he was not also exercising reasonable care for his safety. Under such circumstances the appellee, as administrator, is *entitled to the benefit of the presumption that deceased, moved by love of life and the ordinary instinct of self-protection and self-preservation which is characteristic of living reasoning beings, was in the exercise of reasonable care to that end.* . . . The Dalton Case [Dalton v. Chicago, R. I.

& P. R. Co. 104 Iowa, 26, 73 N. W. 349] involved a highway-crossing accident occurring in the nighttime, without living witnesses of the conduct of deceased; and this court, while conceding that under the circumstances it was the duty of the deceased to stop, look, and listen before venturing upon the crossing, held that, in the absence of any evidence concerning his conduct in that respect, there was a presumption that he did use due care, or, in other words, that he did stop, look, and listen. Indeed, to say that, in the absence of other evidence, the deceased is presumed to have been exercising reasonable care, is, in the very nature of the case, to presume that he did the things, or took the steps, or exercised the caution, which reasonable care required him to do or observe. . . . In Baltimore & P. R. Co. v. Landrigan, 191 U. S. 462, 48 L. ed. 262, 24 Sup. Ct. Rep. 137, the deceased, a railway employee (though not a train man), was run over and killed in the station yard in the city of Washington. No one saw the accident. In some manner he had been struck upon the track, his legs severed or crushed, and his body was found lying near at hand. The trial court instructed the jury that, in the absence of all testimony showing 'whether deceased stopped, looked, and listened before going upon the track, the presumption would be that he did.' In approving this instruction the Supreme Court says: 'We know of no more universal instinct than that of self-preservation—none that so insistently urges to care against injury. It has its motives to exercise in the fear of pain, maiming, and death. There are few presumptions based on human feelings or experience that have surer foundations than that expressed in the instruction objected to.' . . . In Johnson v. Hudson River R. Co. 20 N. Y. 65, 75 Am. Dec. 375, 12 Am. Neg. Cas. 336, discussing the same question, the court says: 'The natural instinct of self-preservation would stand in the place of positive evidence.' The presumption is something more than a mere shadowy generality. In the absence of direct evidence the presumption supplies its place, and if the issue of contributory negligence is the only obstacle to recovery it is sufficient to support a verdict for the plaintiff. True, this presumption may be overcome by a showing of other circumstances from which the jury may fairly conclude that deceased was not in fact exercising due care; *but in the nature of things this counter showing can rarely be so overwhelming and conclusive as to make the question whether the presumption has been fairly*

overcome a matter of law." See also Bickel v. Pennsylvania R. Co. 217 Pa. 456, 118 Am. St. Rep. 926, 66 Atl. 756, and numerous cases cited in the opinion just quoted from.

So, too, we still adhere to the proposition that the evidence that an engine was seen crossing the crossing an hour or so before the accident was admissible, if not to show custom, to show the condition of the trains and the method of the use of the track on the night in question, there being no eyewitnesses to the death, and such facts being pertinent. There is no contention that any foreign railway company was using the tracks. There is no dispute that two of these switch engines of the company were using the tracks. There is no dispute that one engine passed the crossing a number of times. If one of these engines was seen without a tail light an hour before the accident, the evidence of such fact may not be conclusive, but it is competent.

In this connection, as well as in connection with the admissibility of the evidence in regard to the condition of the lights upon the engine before the accident, the case of Southern R. Co. v. Posey, 124 Ala. 486, 26 So. 914, is suggestive. In that case the court held that in an action against a railway company for injuries sustained at a crossing, and where it did not appear that the driver of the wagon knew the condition of the crossing, or that, in the darkness, it could have seen the defect which caused the accident, his deflection within the road from the usually traveled part was not negligence, *he having a right to assume that the entire width of the road was in proper condition. The court also held that testimony of a witness that he came near having a similar accident at the same place a short time before* was competent as tending to show an unsafe condition of the crossing existing at the time of the accident. See also Malmstrom v. Northern P. R. Co. 20 Wash. 195, 55 Pac. 38.

In the case of Chicago & N. W. R. Co. v. Netolicky, 14 C. C. A. 615, 32 U. S. App. 168, 406, 67 Fed. 665, it was held that "it was not error, in any action against a railway company for damages for an accident at a grade crossing, to permit witnesses who are familiar with the locality to testify to narrow escapes they have had at the same crossing, in connection with descriptions of the locality, for the purpose of showing the nature of the crossing and the difficulties of travelers in passing over it."

"The questions of evidence that arise in actions for death," says Tif-

fany in his work on Death by Wrongful Act, § 189, "are for the most part the same as those that arise in ordinary personal injury cases. It is to be observed, however, that by reason of the death of the person injured it is often impossible to prove the facts and circumstances immediately surrounding the injury, and especially the absence of contributory negligence of the deceased, with the same precision and fullness that would be required in an action in which the person injured was alive and able to testify. For this reason, courts incline to greater liberality in this class of cases in allowing the questions of the negligence of the defendant and of the contributory negligence of the plaintiff to go to the jury upon slight evidence." In the case of Chicago & A. R. Co. v. Carey, 115 Ill. 115, 3 N. E. 519, we find the following: "There was no witness of the occurrence. Deceased spent the evening at the store of one Hart, on Fifty-first street, about five blocks east of the appellant's tracks, and was last seen before the injury, by Hart, about 12:30 A. M., when deceased left Hart's store to go to his home, west of the track, and started west on Fifty-first street. . . . About half-past 1 o'clock A. M. deceased was found in a water-closet, about 400 feet west of the tracks, alive, with only one shoe on. His face and hands were bruised, and foot crushed. There was blood all the way from the track and Fifty-first street to this closet. Deceased's other shoe was found in the morning on the north side of Fifty-first street, wedged in between the track and the boards of the sidewalk. At the trial, after the plaintiff had introduced all of her evidence and rested, defendant's counsel moved the court to dismiss the case for want of sufficient evidence to maintain it; and that motion being overruled, evidence was introduced on the part of the defendant, and after all the evidence was in, defendant's counsel again asked the court to instruct the jury that upon the evidence before them it was their duty to find a verdict for the defendant. The court refused to so instruct, and these rulings of the court are assigned as error. Had this instruction been asked at the conclusion of plaintiff's evidence, it should then have been given, as there had been then introduced no evidence of defendant's negligence; all the evidence looking in that direction being that of a witness who, at the probable time of the accident, was three or four hundred feet away, and testified that he had no recollection of hearing the whistle or bell. But the testimony introduced by the defendant furnished such evidence

tending to show negligence that it was then, in our opinion, proper for the court to refuse such an instruction; and if so, appellant has no just ground of complaint for either one of the court's rulings. Defendant's testimony showed that about midnight a gravel train came in from the south and stopped at Fifty-first street. The train was there opened enough to make a cut at the street crossing, and was so left cut in two for a while. Twelve or fifteen cars were pulled over the street to the north side, and the others left on the south side. A short time afterward the train was moved north of Fifty-first street to Forty-ninth street by another engine,—a switch engine,—and put on a side track there, where the gravel cars were to be unloaded. In doing this the engineer of the switch engine testified that, near midnight, he coupled onto the cars of the train which stood north of Fifty-first street, about twelve or fifteen cars north of Fifty-first street, pushed them across Fifty-first street against those standing on the south side, coupled them, and pulled them north over Fifty-first street; that there was a headlight on both ends of the switch engine, and the fireman was all the time ringing the bell. Under such evidence introduced by the defendant, the question of negligence could not properly have been taken by the court from the jury; but it should have been submitted to them to say whether, under the circumstances, there was not negligence in thus pushing these cars across Fifty-first street without the taking of more precaution than appears in this case." In this case exactly the same points were raised by the defendant as are raised in the case at bar, and it is also to be remembered that in Illinois it devolves upon the plaintiff to allege and prove freedom from contributory negligence, which is not the case in North Dakota.

Again, in the case of Phillips v. Milwaukee & N. R. Co. 77 Wis. 352, 9 L.R.A. 521, 46 N. W. 543, we find the following: "There being no witness to this painful accident, how the deceased came to be on the sidewalk at that place, and whether walking north or south on it, must be determined, if at all, by circumstantial evidence. The learned counsel of the appellant contends that it is unaccountable how the deceased came to be there, and it is entirely a matter of conjecture. That may be so, but is it necessary that the plaintiff account for his being on the sidewalk at that time and place? If it is shown that he met his death while walking on the sidewalk where he had a right to be, that is sufficient for

the plaintiff's case, and it is incumbent on the defendant to show that he was guilty of any want of ordinary care in placing himself in that position. It is therefore incumbent on the defendant to account for his being there, and if there is no proof of it, and it is all a matter of conjecture, then it follows that the deceased is presumed to have placed himself where he was killed, with due care, or, at least, without any want of ordinary care. The learned counsel says in his brief: 'Admitting that the deceased had reached that place when struck, is not the manner of his coming there left to conjecture? But verdicts cannot rest upon conjecture.' The verdict in this case does not rest on any conjecture as to how he came there. The verdict for the plaintiff rests rather on the fact alone that he was lawfully there where he had a right to be when he was killed. If the manner of his coming there was not shown, then no negligence of the deceased could be predicated upon it. That was the misfortune of the defendant, and not of the plaintiff. We will not, therefore, consider the plausibility or otherwise of any of the theories of the learned counsel as to how the deceased came to the place where he was killed. The main and important question is, was he struck by the cars while he was on the sidewalk? It seems to be conclusively shown that he was struck and killed at that place. No marks of blood or any traces of his presence on that track west of the sidewalk were found. The presumption is that he was struck and killed where the first blood in that direction was found, which was on the sidewalk. . . . This is not conjecture, but a reasonable inference or deduction from these known facts. The presumption is that he was making the ordinary use of that sidewalk by traveling on it, when he was struck by the car. It would not be a reasonable, but it would be a violent, presumption, that he came to the sidewalk from the north while walking on the defendant's track. He would be a trespasser, and do that which was unlawful to so use the track, and this cannot be presumed. So far, then, the negligence of the deceased is not shown." "Where a person is killed by the negligence of another," said Chief Justice Start in Gilbert v. Tracy, 115 Minn. 443, 132 N. W. 752, "a very strong presumption arises that the deceased exercised due care to save himself from personal injury or death. The presumption is based upon a law of nature, the universal and insistent instinct of self-preservation. The presumption, however, must yield to clear proof of his contributory negligence; but

the question is always one of fact for the jury, unless the undisputed evidence so conclusively and unmistakenly refutes the presumption that honest and fair-minded men could not reasonably draw different conclusions therefrom. . . . There was evidence which was practically undisputed, to the effect that the deceased was wearing a loose jacket, in which there was a tear near the bottom thereof, outside his overalls, on the morning of the day he was injured; that he had been warned that it was dangerous to wear his jacket around the machinery; and that his jacket was found, after the accident, wound around the hand nut on the end of the engine shaft, and that it was the first part of his clothing wound on next to the nut. Such evidence, standing alone, would justify the inference that the deceased was guilty of contributory negligence, but it is not conclusive, as a matter of law, within the rule stated. We are therefore of the opinion that the question of the contributory negligence of the deceased was not a question of law for the trial judge, but one of fact for the jury."

In the case of Union Stock Yards Co. v. Conoyer, 41 Neb. 617, 59 N. W. 950, the court said: "The counsel for plaintiff in error, in an able brief and argument, strenuously contend that there was no evidence which tends to prove that there was any negligence on the part of the company, which was the proximate cause of the injury to the plaintiff; that the verdict of the jury was predicated upon speculation and conjecture, and not upon facts proved or admitted in the case, or inferences deduced from such proved or admitted facts. We will now go back to what we have heretofore alluded to, *viz.*, that the plaintiff in error *did not introduce any testimony, but allowed the case to be submitted to the jury on the evidence on behalf of the plaintiff.* The rule of the law in this state on the subject of contributory negligence, as expressed in the case of Lincoln v. Walker, 18 Neb. 244, 20 N. W. 113, and Anderson v. Chicago, B. & Q. R. Co. 35 Neb. 95, 52 N. W. 840, is as follows: 'In an action for negligence, where the plaintiff can prove his case without disclosing any negligence on his part, contributory negligence is a matter of defense, the burden of proving it being on the defendant.' And the supreme court of Wisconsin has said that there being no witnesses as to how the death of a traveler at a railroad crossing occurred, deceased will be assumed to have been free from contributory negligence, where the circumstances and position in which he

is found *are as consistent with that presumption* as with the presumption of contributory fault. . . . There was no evidence in the case which tends in the least degree to show any contributory negligence or any fault on the part of McAnnelly; and we must consider the case, as to the other points, and the different positions in which McAnnelly was placed, by the evidence, bearing in mind that there is no contributory negligence. After a careful reading of the evidence, we are convinced that there was a strong showing of the bad condition of the track, and sufficient evidence to submit to the jury, and to sustain their finding as to what caused the trucks of the car to leave the track, and also of the knowledge on the part of the company, or lack of it, of this condition; and now we reach the main contention of the plaintiff in error, that there was no testimony to connect the occurrence of the death of McAnnelly with the negligence of the company. In Sackett's Instructions to Juries, p. 36, we find the following: 'The jury are instructed that in determining what facts are proved in this case they should carefully consider all the evidence given before them, with all of the circumstances of the transaction in question, as detailed by the witnesses; and they may find any fact to be proved which they think may be rightfully and reasonably inferred from the evidence given, in the case, although there may be no direct testimony as to such fact;' citing Binns v. State, 66 Ind. 428, and in Thompson, Trials, § 1039: 'What inferences are to be drawn from the facts in evidence is, within reasonable limits, a question for the jury.' And again in § 1677: 'In actions for damage for negligence the general rule is, within limits already indicated, that whether the damage which accrued to the plaintiff is the proximate or the remote result of the negligence of the defendant is the question of fact for the jury; that is to say, when doubt arises as to whether the damages are direct and proximate, or speculative and remote, the question should be submitted to the jury under proper instructions.' In § 1678 of the same work is the following statement: 'In an action for damages for negligence, where the evidence entirely fails to connect the negligence with the fact of the accident, the court should direct the jury that the plaintiff cannot recover, though in many cases the physical facts surrounding the accident will be such as to create a probability that the accident was the result of negligence, in which case the physical facts are themselves evidential, and furnish what the law terms

evidence of negligence.' In Bromley v. Birmingham Mineral R. Co. 95 Ala. 397, 11 So. 341, it was held: 'Plaintiff's intestate, a brakeman on defendant's railroad, was killed by falling from a box car, in the top of which near the brake, was a hole, according to some witnesses, 4 feet long, and according to others, 4 feet square. Deceased was last seen alive, standing at the brake, near this hole. Held, that there was evidence for the jury to consider that the death of deceased was owing to the hole in the top of the car. . . . Where evidence is conflicting, or different inferences can be reasonably drawn from the evidence, or where there is any evidence tending to establish the case of the other side, the general affirmative charge should not be given in favor of either party.' . . . In the case at bar the last time McAnnelly was seen alive by any of the witnesses he was about 4 feet from the train, and was apparently looking it over to see that everything was all right, as the train was then completed, or 'made up' as the railroad men term it, and, after it stood for a short time, 'pulled out.' One witness says: 'After things were all right, as a general thing, two of us got on, me and the foreman, McAnnelly, and after we slack back and see that things are all right, get on as a usual thing.' Mr. Breckinridge. 'Yourself and McAnnelly?' 'Yes, sir.' Mr. Smythe. 'And then you would accompany the train to where it was going?' 'Yes, sir.' 'The whole crew?' 'Yes, sir.' It will doubtless be remembered that there was testimony that at the time McAnnelly was killed they were, as the witness stated it, 'pulling out.' This fact of the usual custom of the crew when they were 'pulling out,' coupled with the facts that McAnnelly's body was discovered between the rails, stretched out lengthwise, and parallel with the rails, with a mark or track apparently made by the body from a point at which it would have fallen from the car, the forward trucks of which were derailed, to the place where it was found; that the first evidences of the body being upon the track were, as one witness expressed it: 'First mark I could discover was about 6 or 8 feet from where the car left the track.' 'In what direction?' 'East. It looked like the print in the cinders of man's hip and shoulder;' that from here to where McAnnelly's body was found there was a distinct mark, which, as all the witnesses testify, appeared to be made by the hip and shoulder, that there were no blood spots or marks, or indications of any kind or nature whatsoever, on either the rail or ties,

that McAnnelly had been struck by the wheels; that the truck had been derailed, and was running with one wheel on the ties on the outside of the rail, constitute an array of physical facts and set of circumstances which fully warranted the trial judge in submitting the case to the jury for their determination; and, finding as the jury did, they would not be called upon, at any point in the case entering into such finding, to draw any inferences which would necessarily be violative of the rule of law which prescribes that 'inferences must be drawn from facts proved;' nor do we think that the verdict rendered necessarily involved any speculation and conjecture, or other than reasonable and fair inferences, in view of all the facts and circumstances proved on the trial as surrounding the killing of McAnnelly." In the case at bar we have evidence of the frog in the highway. We have evidence that a portion, at least, of the body and of the clothing of the deceased was found in that frog. We have evidence of the fact that a shoe was missing from one of the feet of the deceased. We cannot say, as a matter of law, that there was no evidence to go to the jury on the question as to whether the frog in the highway was a proximate cause of the accident.

In the case of Gray v. Chicago, R. I. & P. R. Co. 143 Iowa, 268, 121 N. W. 1097, 1102, the court said: "Reasonable vigilance to know that a public crossing is clear is a duty resting upon those operating railway trains, and that vigilance must bear some reasonable proportion to the known peculiarly dangerous character of the particular crossing which they are approaching. In this case, as we have seen, the fireman was not on guard at his window, and the engineer was in a position from which no effective view of the crossing could be had. In this manner they swept over the crossing at a very high rate of speed. While such facts do not present a case of negligence *per se,* they do present a situation from which a jury may fairly find actual negligence." In the case of Bolinger v. St. Paul & D. R. Co. 36 Minn. 418, 1 Am. St. Rep. 680, 31 N. W. 856, it was held that it was for the jury to determine whether a flagman or other precautions not used were necessary for the safety of travelers at a particular place, and how far any negligence which might rightfully be imputed to the defendant in any of the particulars mentioned was the efficient cause of the accident. In Patterson on Railway Accident Law, § 164,

it is said: "There are some authorities for the proposition that when the railway has followed the statutory directions as to giving signals, etc., it has discharged its whole duty in the premises; but the sounder doctrine would seem to be that compliance with such statutory regulations does not necessarily relieve the railway from the necessity of taking such additional precautions as are essential to the safety of passers on the highway." In § 159 of the same work it is also said: "The effect of the railway's nonperformance of the duty of giving notice of the approach of its trains to a grade crossing when that duty is regulated by statute depends upon the terms of the particular statute, but it may be said that, in general, statutory directions as to giving notice of the approach of a train to a crossing must be followed, and a failure to follow them is negligence to persons on the highway injured while crossing the line." In Thompson's Commentaries on Negligence, vol. 6, §§ 7390, 7391, we find the following: "The general rule is that if there is any evidence tending fairly to show actionable negligence on the part of the defendant, or even scant and slight evidence if it is admitted without objection, the case should be submitted to the jury if it might be reasonably and properly concluded that there was negligence. A case should not be withdrawn from the jury unless a recovery can be had upon any view that can reasonably be taken of the facts which the evidence tends to show, and the fact that the defendant offers strong evidence showing that plaintiff must have been mistaken in her version of the accident will not justify the court in taking the case from the jury. But the jury cannot be permitted arbitrarily to declare that certain actions constitute actionable negligence where there is no proper foundation for such a finding, but there must be facts to warrant the inference of negligence. Thus, a mere surmise of negligence is not sufficient to take the case to the jury. The rule is thus expressed by Williams, J., in Toomey v. London, B. & S. C. R. Co. 3 C. B. N. S. 146, 150: 'A scintilla of evidence, or the mere surmise that there may have been negligence on the part of the defendant, would not justify the judge in leaving the case to the jury; there must be evidence upon which they might reasonably and properly conclude that there was negligence.' This language was approved by Bramwell, B., in Cornman v. Eastern Counties R. Co. 4 Hurlst. & N. 781, 786, and may now be considered as the settled law

in England. As has been pointed out in a former volume, however, the legal scholar on the bench should exercise great caution in substituting his own judgment for that of the twelve men on the jury, as in nearly every case the question whether certain facts tend to show negligence is peculiarly a question to be determined from the standpoint of the ordinary man." The case of Whaley v. Vidal, 27 S. D. 627, 132 N. W. 242, is also in point. The night was a bright, moonlight night, and the engine that struck and killed the deceased was drawing a passenger train due at 10:49 P. M. At a point 161 feet northerly of the crossing, there was an unobstructed view of the track to the east, and the train could have been seen at a point 1,400 or 1,500 feet easterly of the crossing, and at other points between that point and the crossing the train could have been seen from the highway for a distance of from 700 to 1,400 feet. The court said: "It is not contended by the appellants that there is any direct evidence showing that the deceased did not stop, look, and listen, but that the circumstances were such that the inference is irresistible that he did not so stop, look, or listen; but we are of the opinion that the court was not authorized to draw such an inference as a matter of law from the facts disclosed in this case. Where reasonable men might draw different conclusions from the undisputed evidence, the question of negligence or contributory negligence is one of fact for the jury; and it is only when the evidence is without material conflict, and is such that all reasonable men must draw the same conclusion therefrom, that the question is for the court. (The opinion then cites numerous cases and proceeds.) In the absence of evidence to the contrary, the law presumes that the deceased exercised such degree of care and caution as the circumstances and the law require, and the burden of proving that he did not rests upon the defendants throughout the case, and is a question for the jury. (Citing numerous cases.) In the case of Texas & P. R. Co. v. Gentry, 163 U. S. 353, 41 L. ed. 186, 16 Sup. Ct. Rep. 1104, the Supreme Court of the United States held, as appears by the fourth headnote, as follows: 'Where no one personally witnessed the crossing of the track by deceased, nor his death while crossing, the presumption is that he stopped and looked and listened for approaching trains; and hence it is proper to refuse to charge that there could be no recovery if deceased, by looking and listening, could have known of the approach of the car

in time to have kept off the track and prevented the accident.'" In the case of Soeder v. St. Louis, I. M. & S. R. Co. 100 Mo. 673, 18 Am. St. Rep. 724, 13 S. W. 714, it was shown by the plaintiff that the deceased was engaged at night in switching cars on a track where there was a rail so worn for the space of from 4 to 6 feet as to make a depression for that distance of an inch and a quarter, so that a car passing over it would be jolted or jarred, and that deceased fell from the car on which he was riding at his post of duty, striking the ground at a point consistent with the theory that he was thrown from the car by the jar in passing over the depression in the rail, and that he was dragged some distance and was killed, though nobody saw the accident. It was held that the evidence was sufficient to authorize the case to go to the jury. In the case of Knudson v. Great Northern R. Co. 114 Minn. 244, 130 N. W. 994, the court said: "The evidence was concededly sufficient to take the case to the jury on the issue of the defendant's alleged negligence in not giving the statutory signals as the engine approached the highway crossing; and the only question presented by the record is whether the evidence so conclusively established the contributory negligence of the intestate as to make the case an exceptional one, and require the judge to decide the issue as a matter of law. There was evidence tending to establish the evidentiary facts following: The intestate was a farmer, who lived 3½ miles from the station, and was familiar with the defendant's railway tracks in the vicinity of the highway crossing; that the highway ran through the village, along the south side of the defendant's roadbed and tracks for about half a mile, where it turned across the railway tracks, one of which was the main and the other the passing track, which was the first track to be crossed in going west; that a person driving along the highway, towards the crossing, when he got within 100 feet of the crossing would have an unobstructed view to the southeast of the railway tracks, the direction from which the engine and cars came which killed the intestate; that there were switch lights, street lights, and the station buildings in the direction from which the engine came; that at the time of the accident it was very dark and hazy, and the wind was blowing from the south; that the engine was equipped with a very dim headlight, apparently no better than a smoky lantern; that the engineer first discovered the intestate when the engine was close to the cross-

ing, some 25 feet therefrom; that the head brakeman, who was sitting on the fireman's side of the engine, cried out, 'Stop,' and the engineer jumped up and began to throttle the engine; he looked out of the window, and the headlight enabled him to see the crossing and also the horses jump on the track; that when the engineer was in the act of closing the throttle the engine struck the team, and the intestate was instantly killed; and, further, that no warning that the engine was approaching the crossing was given. The evidence as to many of these facts was radically conflicting; but, in determining whether the defendant was entitled to a directed verdict, that view of the evidence most favorable to the plaintiff must be accepted. The question then is: Does the evidence so clearly and so conclusively establish the intestate's contributory negligence that fair-minded men could not draw any other conclusion therefrom? If the accident had happened in the sunlight, but one conclusion could be fairly drawn from the evidence; namely, that the intestate must have been guilty of contributory negligence. Such, however, is not this case; and we are of the opinion, in view of the conditions under which the intestate attempted to cross the railway tracks, that the question of his negligence was one upon which fair-minded men might well differ. It is not conclusive from the evidence that the intestate did not look or listen for approaching engines and trains as he neared the crossing, or that, if he had done so, he must necessarily have discovered the impending danger. It may be reasonably inferred that the wind in some degree prevented him from hearing the approaching engine. Nor does it necessarily follow that, if he had looked, he must have seen the engine in time to have saved himself; for the dim headlight in the darkness may have misled him. It is not an unreasonable inference that the headlight might have appeared to him to be stationary, or one of the several lights in the direction from which the engine was coming. That the night was dark, and the headlight a delusion, instead of a warning, is indicated by the testimony of the engineer, who, it will be presumed, was vigilant as he approached the highway crossing, and yet he did not see the intestate's team until he was within 25 feet of the crossing, when he saw the horses jump on the track. Again, the plainest principles of human justice forbid that it should be inferred, as a matter of law, that a man killed by the negligence of another was guilty of negli-

gence contributing to his death, unless the undisputed evidence clearly and fully rebuts the presumption, founded on the universal and insistent instinct of self-preservation, that he exercised due care for his safety. We hold, upon a consideration of the whole evidence, that the question of the negligence of the intestate was one of fact, to be decided by the jury, and not by the judge."

We are not unmindful of the statement to be found in vol. 1, § 556 of Moore on Facts, that "the presumption that a traveler looked and listened before attempting to cross a railroad track does not overcome the presumption that a train approaching in plain view was seen by him. In such a case the presumption of due care would be at variance with the physical facts." We, however, have examined all of the cases cited by the author in his note to the proposition. We fail to see that any of them present a case parallel to the one at bar. In none of them was the train one which was switching backwards and forwards over a crossing, which might be seen passing, but might return without warning, but a train in the proper sense of the word. So, too, in none of them, with the exception of the case of Kwiotkwoski v. Chicago & G. T. R. Co. 70 Mich. 549, 38 N. W. 463, was there evidence that the night was dark and stormy; in other words, that there was a wind of the velocity of from 30 to 40 miles an hour, and dust and gravel and *débris* flying, accompanied by a temperature of about 18 degrees below zero, and in practically all of them there was testimony of eye-witnesses which strongly negatived any idea of due care on the part of the deceased.

We have also spent much time in examining the authorities cited by counsel for appellant, but our examination has satisfied us that none of them present facts similar to those to be found in the case at bar. It is sufficient to analyze but a few of them. The same criticism will apply to practically all.

In the case of Sherlock v. Minneapolis, St. P. & S. Ste. M. R. Co. 24 N. D. 40, 138 N. W. 977, the accident took place in the broad daylight. The evidence showed that there was no natural physical obstruction to a view of the train for nearly a mile, and in addition to this the deceased was observed by at least four witnesses, "and at all times when so observed had his fur collar turned up over his ears, and was looking to the westward, while the train approached from the east."

In the case of Tyndale v. Old Colony R. Co. 156 Mass. 503, 31 N. E. 655, the deceased was operating a velocipede upon a railroad track, and was run over by an express train which was following him. The evidence showed conclusively that the deceased did not have his lanterns lighted upon the velocipede, and this the court held was, in itself, contributory negligence. In addition to this fact was the fact that when last seen he was going at a rate of speed nearly as great as the train which overtook him, and if he had turned his head in any time he could have seen the approaching train in time to escape the accident. Massachusetts, too, is a state in which the burden of proving freedom from contributory negligence is upon the plaintiff. In the case of Bressler v. Chicago, R. I. & P. R. Co. 74 Kan. 256, 86 Pac. 472, the evidence showed that the team moved upon the crossing in a walk; that he could have seen the train from a distance of 155 feet; that he jumped from the wagon, and if he had not done so he would have crossed in safety; and there is no evidence whatever as to the state of the weather or the time of day. In the case of Kwiotkwoski v. Chicago & G. T. R. Co. supra, the evidence, it is true, showed that the deceased was killed on a rainy, dark night, but the evidence also showed that the locomotive had a blazing headlight which lighted up the track for at least a block; that a witness, who was going towards the engine at the time of the accident, saw the headlight plainly, and first saw the train about five blocks away; that the noise of the approaching train was heard by two men in a wood office about 20 feet from the track. In the case of Carlson v. Chicago & N. W. R. Co. 96 Minn. 504, 4 L.R.A.(N.S.) 349, 113 Am. St. Rep. 655, 105 N. W. 555, the evidence showed conclusively that when the deceased was 50 feet from the track a train could have been seen 2,500 feet from the crossing, and the accident happened in the daytime. There, too, was no evidence of any storm or that the weather was cold. In the case of J. F. Conrad Grocer Co. v. St. Louis & Suburban R. Co. 89 Mo. App. 534, the accident occurred at 6 o'clock in the evening, when it was growing dusk. A witness for the plaintiff testified that she saw the train four or five hundred feet away. Several witnesses testified that the noise of the train was audible at this distance. The day was gloomy, but there is no evidence of wind or cold. There is no evidence that the speed of the train was excessive. In the case of Blotz v. Lehigh Valley R. Co.

212 Pa. 154, 61 Atl. 832, the train could have been seen at a distance of 150 feet, 95 feet from the crossing, though it could not have been seen while passing along the 500 feet nearest to the crossing, until within 15 or 20 feet of the track. There is no evidence in the case as to the time of day or as to the weather. In the case of Connerton v. Delaware & H. Canal Co. 169 Pa. 339, 32 Atl. 416, the accident occurred at 9 o'clock in the evening. At a distance of 50 feet from the tracks the view was unobstructed for 1,000 feet, and the same was true at a distance of 20 or 25 feet from the tracks. The train was coming with a blazing headlight. There is no evidence as to the state of the weather or the time of the year. In the case of Wood v. Pennsylvania R. Co. 177 Pa. 306, 35 L.R.A. 199, 55 Am. St. Rep. 728, 35 Atl. 699, the evidence showed that the train could not be seen from 150 to 200 yards distant. Plaintiff himself testified that he heard it coming, and all of his witnesses had notice of it. It was not a death case, and the court held that in any event the negligence complained of, which was a failure to give a signal, which resulted in the killing of a person on the crossing, could not be held to be the proximate result of the injury which resulted from the body of the deceased being thrown against the plaintiff, who was standing on a depot platform 50 feet away.

In the case of Tomlinson v. Chicago, M. & St. P. R. Co. 67 C. C. A. 218, 134 Fed. 233, the train was a regular passenger train. The view was unobstructed, and the locomotive headlight could have been seen when the train was at any point on the track within a half a mile or more of the crossing, by a traveler upon the highway at any point within 300 feet. It was 6 o'clock in the evening. There was a mist or fog, though there is no evidence that there was any wind or that it was cold. The surface of the highway at 100 feet west of the crossing was 5½ feet below the track. It was dark. One of the witnesses for the plaintiff said that he heard the train and saw the headlight about 4 miles away, and another testified that he saw it about 3 miles distant. In the case of Northern P. R. Co. v. Freeman, 174 U. S. 380, 43 L. ed. 1014, 19 Sup. Ct. Rep. 763, the train could have been seen at 40 feet for about 300 feet. The deceased was driving in a wagon at a trot. Witnesses testified that the deceased looked straight before him, without turning his head either way, and trotted directly

on the crossing, and made no motion to stop until just as the engine struck him; that his head was down; and he was looking at the horses. The train was a freight train, going at a speed not to exceed 20 miles an hour. There is no evidence as to the time of day or as to the condition of the atmosphere or temperature. In the case of Woolf v. Washington R. & Nav. Co. 37 Wash. 491, 79 Pac. 997, the deceased was killed by what seems to have been a solitary engine. At any point between 50 and 100 feet from the track a person could have seen along the track for a distance of 600 feet or more. At any point on the highway between 100 and 475 feet of the crossing, an engine could be seen at a distance of from 475 to 600 or 800 feet from the crossing. The accident happened in the daytime. One witness testified that when the deceased was about 50 feet, more or less, from the crossing, driving at a slow walk, he looked toward the engine, and immediately whipped his horses with the lines in an effort to cross ahead of the locomotive. Another witness testified, however, that he whipped up the horses when he was just about to cross. Though there were eye-witnesses to the accident, there was no evidence of his looking at any other point or any other time prior to those just mentioned. In the case of Dalton v. Chicago, R. I. & P. R. Co. 114 Iowa, 257, 86 N. W. 273, a verdict had been directed for the defendant in the court below. This was reversed because of the introduction of evidence prejudicial to the plaintiff. In it, however, the court held that where, in an action to recover for the killing of a person at a crossing, plaintiff requested an instruction that in the absence of direct evidence of decedent's conduct, the law presumes him to have been in the exercise of ordinary care until the contrary appears, which presumption should be considered in connection with the facts and circumstances disclosed by the evidence in determining whether he was in the exercise of ordinary care, there was no error of which the plaintiff could complain in the court's instructing that in the absence of direct evidence of decedent's conduct, the law presumes that he exercised ordinary care until the contrary appears; but such presumption does not control if, from the whole evidence, it appears that decedent, in the exercise of ordinary care, could have avoided the collision by stopping, looking, and listening. In this case, however, there was evidence also tending to show that the deceased was asleep at the time of the accident. In the

case of Schmidt v. Missouri P. R. Co. 191 Mo. 215, 3 L.R.A.(N.S.) 196, 90 S. W. 136, the evidence of the plaintiff showed that the accident took place at 2 o'clock in the afternoon; that the plaintiff could have seen the approaching train at least some 250 feet distant, and that the plaintiff did not look when he approached the track towards the approaching train. This was the testimony of plaintiff's own witnesses. There is no evidence that it was stormy. In the case of Crawford v. Chicago G. W. R. Co. 109 Iowa, 433, 80 N. W. 519, and in which jurisdiction the burden to show freedom from contributory negligence was upon the plaintiff, the evidence showed that at a point 300 feet north of the crossing, and until within 150 feet of the track, a person could have seen an approaching train from the north at all times; that from 150 feet of the track to the crossing a person could see an approaching train for a distance of 500 or 600 feet. The train was running southward, and the plaintiff was going along a road which was running east and west. When last seen, plaintiff was standing facing the west. It was clear that he could have seen the train at any time from 125 to 50 feet from the track, and could have avoided the accident. There is no evidence as to the time of day or the condition of the weather. In the case of Chicago, R. I. & P. R. Co. v. Pounds, 27 C. C. A. 112, 49 U. S. App. 476, 82 Fed. 217, for more than 200 yards before the plaintiff reached the railroad crossing he was in plain view of the approaching train. There is evidence that about 300 yards from the station there was a cloud of dust; that it was clear that he could have seen the train during the greater part of his approach. The accident appears to have taken place in the daytime. In the case of Pyle v. Clark, 25 C. C. A. 190, 49 U. S. App. 260, 79 Fed. 744, 2 Am. Neg. Rep. 100, the view of the plaintiff was unobstructed for 200 feet. He stopped his horses 15 to 25 feet from the track, sat quietly in his wagon for a minute, looked towards the train, and then, without looking again, drove slowly over the track. The accident took place at 4 o'clock in the afternoon on a clear day. In the case of Hope v. Great Northern R. Co. 19 N. D. 438, 122 N. W. 997, plaintiff drove "over the crossing in question with a load of wheat about ten minutes before the accident, so that he knew the situation there and the location of the tracks. After unloading the wheat he turned around and returned to the crossing, driving parallel to the tracks and south of them,

not stopping once in this drive. There was a string of box cars on the center track, and other cars on the elevator track, and three elevator buildings all of which shut out the view of the main track from him. . . . The driver looked east as he was going down the elevator bridge, but did not see any train, saw the cars on the elevator track and passing track. It was quite cold and he was dressed warmly, had his cap down about the edge of his ears. The ground was frozen, and the double box on the wagon was empty. The wagon made a noise on the hard road, so that he did not hear the train or any noise except that made by the wagon. From the time he left the east elevator until the collision his team did not stop except that, after he crossed the first track, he pulled up the lines and momentarily stopped them; he said because 'he did not want to gallop over the track.' He said 'they were just standing still for a moment; that is, just for an instant. I jerked them back, and they stopped like that, and away they went again. I was between the box cars when the horses jumped. They took fright.' . . . There was no point after he left the elevator at which it was possible for him to see the main track or the train coming on it from the east. *According to his own testimony he paid no attention whatever to the approach of the train on the main track.* At no time did he stop his horses or listen for the train. The noise of the moving train conveyed no warning to him. The noise of his wagon on the hard frozen ground probably prevented him from hearing it."

It will be seen that in the greater number of these cases there were eyewitnesses to the accident, and that they were not cases where there was any need for the application of the presumption of self-preservation, and in none of the cases were the facts in regard to the weather and the other physical facts similar to those in the case at bar. Where, indeed, in the case at bar is there any evidence of contributory negligence which would overcome the presumption of due care? We must remember in North Dakota that not only is there a presumption of self-protection, but also that the burden of proof of contributory negligence is upon the defendant. Outside of the testimony of the engineer that he rang his bell, all the evidence of contributory negligence on the part of the deceased is to be found in the testimony that: "If a man was looking in the dark that night he might see a man 25 or 30 feet away. There was some lights in the yards that night. There were lights on

the depot. If a man was looking that way he could see further. If he was looking to the east, I think he could see a man at the depot, because the lights would be back of him. Looking from the east to the crossing you could probably see a box car from 100 to 150 feet. That would depend where the light was striking it. I said you could see a man in the dark about 25 or 30 feet if there were no lights beyond them. Looking towards the east you could see a box car in the dark about 150 or 200 feet. I had occasion to look down the yards that night. I was there at the body ten or fifteen minutes. I could see the shadow of the lights at the depot. I could see the outline of the building. I could see the outline of a very few of the cars where they were beyond the light limit. I could see some of them where they were in the light limit." Opposed to this are all of the other physical facts which we have mentioned. The question is, Must there be but one conclusion from the facts proven, probative in its force and sufficient to overcome the presumption arising from the instinct of self-preservation? We do not think so, and we have yet to find any authorities which support the appellant in his contention.

This testimony does not prove contributory negligence as a matter of law, so as to justify this court in taking the determination of the fact from the jury. There is no evidence that at any time before the deceased reached the track, the car or engine which occasioned the accident was within 200 feet of the crossing. The blood found upon the tender of the engine is at least some evidence that it was backed down upon the deceased. The evidence tends strongly to show that he stepped into the frog which was in the highway and from 4 to 6 feet east of the planking on the crossing. The jury were perfectly justified in inferring that when he reached the crossing he was for the first time aware of an engine approaching at a distance of 150 to 200 feet. Such a sight would naturally startle him, and it is by no means improbable that he stepped to the right, off the planking and into the frog. On a dark and stormy night, with a wind blowing at from 30 to 40 miles an hour, and dust, gravel, and *débris* blowing, which some of the testimony shows, it is not by any means improbable that in crossing the track he should have stepped to the side of the planking which he had a right to do, it being the duty of the railway company to plank the crossing for its entire width. At any rate, we cannot say that it would

have been contributory negligence for him to do so. If the approaching train was going at the rate of 20 miles per hour, and when first seen was 200 feet away, it would have reached him in less than seven seconds. If it was 150 feet away, and, going at the same rate, it would have reached him in less than six seconds. If it was going at the rate of ten miles per hour, it would have reached him in less than fourteen seconds and eleven seconds respectively. If his foot was caught in the track, or he stumbled in any way, or hesitated in his confusion at first seeing the train, he might not have had time to escape the accident. At least the jury could so infer. Can this court, as a matter of law, say that the presumption of due care which the instinct of self-preservation raises, is overcome by this evidence? In North Dakota, as we before stated, the burden of proving contributory negligence is upon the defendant, and not upon the plaintiff, and as we have before suggested, in nearly all of the cases cited by counsel, not only are the physical facts different, but there were eyewitnesses to the occurrences. In the case of Klotz v. Winona & St. P. R. Co. 68 Minn. 341, 71 N. W. 257, 3 Am. Neg. Rep. 201, we find the following language: "It cannot be said that in all cases, as a matter of law, it is the duty of the traveler to stop and look and listen for the approaching train. The case at bar, we think, is one where the surroundings were of such a character that made the question one of fact rather than one of law. There was a rumbling noise of the city mill near by; the moving of the engine eastward from where plaintiff was traveling, with its noise and blowing of its whistle, which might have operated to throw the plaintiff off his guard. By reason of so much noise from different sources, and especially from the engine which he could see moving away from him, he might have been deceived and misled. This rule as to noise has been applied where there was the sound of falling water at a crossing; Richardson v. New York C. R. Co. 45 N. Y. 847. Also where the noise was caused by a wagon and by a steam sawmill and by another train. Leonard v. New York C. & H. R. R. Co. 10 Jones & S. 225. See also Hendrickson v. Great Northern R. Co. 49 Minn. 245, 16 L.R.A. 261, 32 Am. St. Rep. 540, 41 N. W. 1044. Nor can it be said that the deceased was intentionally guilty of negligence or recklessness in his conduct. The moment he discovered the tender near him he made an effort to get out of its way, but was impeded by

the wheelbarrow, and the rope around his neck and attached to it, whereby he was jerked down by the tender and injured. The love of life is also too strong to permit us to indulge in any presumption that he acted recklessly, or that he did not do what a prudent man ordinarily would do to save his life. The railroad tracks were nearly parallel, and not far apart; the engine passing over them only about three times a day, and he may have been led to believe that the engine was continuing its eastward course away from him. The position of the ringing bell as the engine approached the crossing may have tended to force very much of its sound away from him. All of these matters, in connection with the omission of the defendant to have a footboard or other contrivance on the engine or tender to carry a lookout, the rate of speed of the engine, and its moving backward, all tend to rebut the charge of contributory negligence on the part of the deceased. A traveler approaching a railroad crossing has a right to presume that in handling its cars the railroad company will act with proper care, and that the signals of approach will be seasonably given. . . . It is the settled law of this state that contributory negligence is a matter of defense, and the plaintiff in making out his case need not prove the absence of it. And where there is any controversy as to the fact, and different conclusions might be drawn by fair-minded men, the question of contributory negligence is one for the jury, acting under proper instructions from the court." It is to be remembered that in the case at bar, though the witness Wordeman was questioned as to whether any men were placed on the footboard of the engine, his testimony was unsatisfactory and indefinite. There were men there at times, but at what times and when crossing the crossing, was not testified to. It is quite clear at any rate that if they had been on the footboard of an approaching engine when deceased was struck at the crossing, that they would have seen him.

The testimony of the witness Wordeman, the engineer on the freight engine, is as follows:

This switch engine has footboards. Two of them. One in front and one in the rear.

Q. Did you see any of the switch crew standing on the footboard as you went across this crossing that night?

A. I forget if there was anybody.

Q. I asked you if at any time you saw anybody standing on the footboard?

A. Yes.

Q. When, that night, in point of time did you see anybody standing there?

A. At all hours.

Q. Then you saw somebody standing on that footboard at 10 o'clock and right along every minute?

A. No, it is their business.

Q. I don't ask you about their business. I want to know if you saw this switch crew standing on that footboard as you went west that night.

A. At certain times I did.

The supreme court of Michigan, in the case of Cooper v. Lake Shore & M. S. R. Co. 66 Mich. 261, 11 Am. St. Rep. 482, 33 N. W. 306, held that it was gross negligence to back a train without a brakeman at the rear and as a lookout, across the main thoroughfare of a village where there is no flagman at the crossing, even at a rate but little faster than a person walks. It is not necessarily a sufficient exercise of care on the part of a railway company whose tracks cross a highway at a grade, to sound the whistle and ring the bell of its engines; but such company is bound to so manage its trains, and to give such other warnings of their approach, or take such other reasonable precautions as not to cause unnecessary risk to persons on or about the crossing. Chicago & N. W. R. Co. v. Netolicky, 14 C. C. A. 615, 32 U. S. App. 168, 406, 67 Fed. 665; Thompson v. New York C. & H. R. R. Co. 110 N. Y. 636, 17 N. E. 690.

It is, as we have before said, to be remembered that in North Dakota contributory negligence is a matter of defense, and freedom from the same is not necessary to be alleged in the complaint or proved by the plaintiff. This fact is well worth remembering, and it distinguishes many of the cases. The case of Grant v. Philadelphia, B. & W. R. Co. 215 Pa. 265, 64 Atl. 463, which is cited in § 37 of Moore on Facts, as tending to support the proposition that the jury cannot guess as to contributory negligence, and that where it was equally

probable that the deceased adopted a course of travel which was consistent with negligence as with due care, the court would not infer the former,—was a case in which the burden of proving and alleging freedom from negligence was upon the plaintiff. The author of the work, in fact, recognizes this fact, and in his note he says: "Evidently, if the burden of contributory negligence had rested upon the defendant, the latter would have failed for the same reason." We cannot, under the authorities, assume or entertain the hypothesis that the deceased crawled beneath the cars. There is no evidence of this fact. It is merely a hypothesis and guess of counsel, which is supported by no evidence and no presumptions. It is opposed to the presumption of a natural regard for one's self-preservation.

We hardly see, in the light of the decisions and of the record, how this court merits the charge made by the appellant in his petition for a rehearing, that it has distorted the evidence, established erroneous rules of law, and destroyed the precedents of the past. We have not even established a new rule in North Dakota. The rule in this state was thoroughly explained, if not laid down, by ex-Chief Justice Young in the case of Pyke v. Jamestown, 15 N. D. 157, 107 N. W. 359, when he said: "The question of negligence, whether it be of a defendant or the alleged contributory negligence of a plaintiff, is primarily and generally a question of fact for the jury. The question becomes one of law, authorizing its withdrawal from the jury only when but one conclusion can be drawn from the undisputed facts. 'If the undisputed facts are of such a character that reasonable men might draw different conclusions or deductions therefrom, then the question of negligence must be submitted to the jury.' " This doctrine has been recently affirmed by this court. See Kunkel v. Minneapolis, St. P. & S. Ste. M. R. Co. 18 N. D. 367, 121 N. W. 830. It is abundantly borne out by the decisions of the American states.

See also: Allen v. Pennsylvania R. Co. 9 Sadler (Pa.) 382, 12 Atl. 493; Illinois C. R. Co. v. Norwicki, 148 Ill. 29, 35 N. E. 358; Richmond & D. R. Co. v. Powers, 149 U. S. 43, 37 L. ed. 642, 13 Sup. Ct. Rep. 748; Dalton v. Chicago, R. I. & P. R. Co. 104 Iowa, 26, 73 N. W. 349; Galvin v. New York, 112 N. Y. 223, 19 N. E. 675; Hemingway v. Illinois C. R. Co. 52 C. C. A. 477, 114 Fed. 843; Whaley v. Vidal, 27 S. D. 627, 132 N. W. 242; Texas & P. R. Co. v.

Gentry, 163 U. S. 353, 41 L. ed. 186, 16 Sup. Ct. Rep. 1104; Frederickson v. Iowa C. R. Co. — Iowa, —, 135 N. W. 12; Soeder v. St. Louis, I. M. & S. R. Co. 100 Mo. 673, 18 Am. St. Rep. 724, 13 S. W. 714.

We are still of the opinion that there was sufficient evidence of financial interest to sustain the verdict of the jury, and that no error was committed in the admission of testimony. See 13 Cyc. 376, and cases cited; Sieber v. Great Northern R. Co. 76 Minn. 269, 79 N. W. 95. We, therefore, see no reason for reversing our former holding or for granting a rehearing. We have, however, after the filing of the petition, and influenced thereby, modified some of the statements made in the original opinion.

The petition for a rehearing is denied.

STACY FRUIT COMPANY, a Corporation, v. GEORGE McCLELLAN.

(142 N. W. 44.)

This action was begun in justice court. Defendant in due season presented to the justice his affidavit of prejudice and demand for change of venue, together with $1, which were accepted. The affidavit and demand was not filed, because defendant refused to pay an additional ten cents filing fee therefor, because of which the justice ignored the application, and, defendant not participating further, the justice entered a judgment against him, from which he appealed to the district court, upon questions of both law and fact, and in his notice of appeal demanded a trial *de novo* in the district court. Judgment in the district court was thereafter rendered by default against defendant, who subsequently moved to vacate the judgment as void and to dismiss the action for want of jurisdiction, contending that the affidavit and motion for change of venue in justice court ousted that court of all jurisdiction of subject-matter; and that on appeal the district court was not clothed with jurisdiction of the subject-matter, the justice court having none. The district court granted the motion to the extent of vacating its judgment, but retained the case for trial on the merits. Plaintiff, former judgment creditor, appeals. It is *held*:—

Change of venue — affidavit — motion justice court — fee — jurisdiction.

(1) The payment of $1 was a sufficient fee under the statute, and said payment, with the affidavit and motion for change of venue, rendered the justice

powerless to proceed with the merits of the cause. For all purposes the affidavit and motion is to be considered in law as filed.

Change of venue — affidavit of prejudice — jurisdiction — transfer of cause.

(2) The filing of an affidavit of prejudice and motion for change of venue, while superseding and staying all further powers of that court, did not devest it of jurisdiction of subject-matter or of person, but jurisdiction remained in a court powerless to do other than the ministerial act of entering an order transferring the cause to another justice for trial.

Justice — judgment — excess of jurisdiction — appeal — district court — subject-matter — jurisdiction.

(3) An appeal will lie from a judgment so rendered by a court in excess of its jurisdiction; and upon such an appeal perfected the district court acquires the full jurisdiction of the subject-matter possessed by the lower tribunal.

Order vacating judgment — judgment — reinstated — findings.

(4) The order vacating the judgment having been entered without grounds, the same is ordered set aside and the judgment so vacated reinstated as the final judgment in the case, it having been entered upon findings and after proof taken.

Opinion filed May 24, 1913.

Appeal from an order of the District Court for Benson County, *Cowan*, J.

Reversed.

Styles & Koffel, for appellant.

The action was in the district court for trial, regardless of what had occurred in justice's court, because the appeal was taken upon questions of both law and fact, and the *notice of appeal* was a waiver of mistakes in the justice's court. Rev. Codes 1905, § 8509.

It was not an appeal upon questions of law alone. The notice of appeal does not specify the errors of law complained of; and on such appeal only such questions as are specified as error can be reviewed. Rae v. Chicago, M. & St. P. R. Co. 14 N. D. 511, 105 N. W. 721; Rev. Codes 1905, § 8501.

The appeal taken invoked the jurisdiction of the district court to try the case anew, and that court had jurisdiction to enter the judgment it did enter. N. D. Codes, § 8509; Lyons v. Miller, 2 N. D. 1, 48 N. W. 514; Mouser v. Palmer, 2 S. D. 466, 50 N. W. 967; Wimsey v. McAdams, 12 S. D. 509, 61 N. W. 884; William Deering & Co. v. Venne, 7 N. D. 583, 75 N. W. 926; Dikeman v. Struck, 76 Wis. 332,

45 N. W. 118; 2 Enc. Pl. & Pr. 614, note 2; Seurer v. Horst, 31 Minn. 479, 18 N. W. 283.

A justice's record and return cannot be attacked by affidavit. Mouser v. Palmer, 2 N. D. 466, 50 N. W. 967.

The service of notice of intention, provided by § 7065 of the Code, is a prerequisite to the authority of the district court to entertain the motion. MacGregor v. Pierce, 17 S. D. 51, 95 N. W. 281; Moddie v. Breiland, 9 S. D. 506, 70 N. W. 637.

Ground for new trial must be specified in notice of intention to move for new trial. State ex rel. Hart-Parr Co. v. Robb-Lawrence Co. 17 N. D. 265, 16 L.R.A.(N.S.) 227, 115 N. W. 846.

Defendant's motion was to *vacate the judgment;* neither party moved for a *new trial.* It was too late for court to grant a new trial of its own motion. Gould v. Duluth & D. Elev. Co. 2 N. D. 216, 50 N. W. 969.

Stuart & Comstock, for respondent.

Where a paper is left with the proper officer for the purpose of being filed, the mere fact that he omits to mark it filed is immaterial. 7 Am. & Eng. Enc. Law, 960, note 1, pp. 960–963; Schulte v. First Nat. Bank, 34 Minn. 48, 24 N. W. 320; Nickson v. Blair, 59 Iowa, 531, 13 N. W. 641; Witt v. Meyer, 69 Wis. 595, 35 N. W. 25; Stone v. Crow, 2 S. D. 525, 51 N. W. 335; Starkweather v. Bell, 12 S. D. 146, 80 N. W. 185; Trinidad Asphalt Mfg. Co. v. Buckstaff Bros. Mfg. Co. 86 Neb. 623, 136 Am. St. Rep. 710, 126 N. W. 293; 8 Enc. Pl. & Pr. 923, 924; State ex rel. Seth Thomas Clock Co. v. Cass County, 60 Neb. 566, 83 N. W. 735; Dredla v. Baache, 60 Neb. 655, 83 N. W. 918; Coler v. Rhoda School Twp. 6 S. D. 640, 63 N. W. 158; Smith v. Nicholson, 5 N. D. 426, 67 N. W. 296; 19 Cyc. 530.

The filing of the motion and affidavit for change of venue, and the payment of $1, deprived the justice of jurisdiction of the subject-matter of the action. Orcutt v. Conrad, 10 N. D. 434, 87 N. W. 982; State v. Kent, 4 N. D. 577, 27 L.R.A. 686, 62 N. W. 631; State v. Finder, 12 S. D. 423, 81 N. W. 959; Foster v. Bacon, 9 Wis. 346; Western Bank v. Tallman, 15 Wis. 92; State v. Rowan, 35 Wis. 303; Vidger v. Nolin, 10 N. D. 359, 87 N. W. 593; Wimsey v. McAdams, 12 S. D. 509, 81 N. W. 884; Long v. Sharp, 5 Or. 438; Plunket v. Evans, 2 S. D. 434, 50 N. W. 961; Benedict v. Johnson, 4 S. D. 387, 57 N. W. 66; Austell v. Atlanta, 100 Ga. 187, 27 S. E. 983; Arne-

gaard v. Arnegaard, 7 N. D. 475, 41 L.R.A. 258, 75 N. W. 797; Fatt v. Fatt, 78 Wis. 633, 48 N. W. 53; Rines v. Boyd, 7 Wis. 155.

The change of venue deprives the justice of all discretion and all further jurisdiction in the case. Runals v. Brown, 11 Wis. 185; Dykeman v. Budd, 3 Wis. 640; Damp v. Dane, 29 Wis. 431; Plano Mfg. Co. v. Rasey, 69 Wis. 246, 34 N. W. 85.

The motion to set aside the judgment was the proper remedy. Freeman v. Wood, 11 N. D. 1, 88 N. W. 721; 1 Black, Judgm. 1891 ed. § 303, p. 379; Benedict v. Johnson, 4 S. D. 387, 57 N. W. 66.

Goss, J. This action was begun in justice court to recover a money judgment in an amount within the jurisdiction of that court to determine. Service of summons upon defendant was had, who, on return day, appeared in person and gave the justice $1 and an affidavit of prejudice and demand for change of venue, as required under §§ 8375 and 8377, Rev. Codes 1905, which the justice received but refused to file, because an additional fee of 10 cents therefor was not paid him. Defendant did not further participate in proceedings in justice court, which court thereafter ignored the attempt at obtaining a change of venue and entered up judgment against defendant, who subsequently appealed to the district court by a general appeal upon both law and fact, and demanded in his notice of appeal a trial *de novo* in the district court. Defendant, also, with his notice and undertaking on appeal, served a verified answer containing a statement that it was served, because required by statute to confer jurisdiction upon appeal for any purposes, but attempting to reserve the right in district court to make thereunder a special appearance to except to the jurisdiction of that court. Thereafter the district court, on defendant's default, tried the cause, made findings and conclusions, and ordered judgment in favor of plaintiff, and on October 3, 1910, judgment for $76.98 was entered. Subsequently, on September 8, 1911, on defendant's application after due notice, the district court, on motion to vacate and to dismiss for lack of jurisdiction of the subject-matter of the suit, set aside its judgment, and granted a new trial, and ordered that the case stand for trial and final disposition upon the regular December, 1911, calendar of the district court. The order does not show the grounds upon which it was entered. The motion for vacation of judgment, thus set aside, was

based upon a want of jurisdiction of either court of the subject-matter of the action, and sought a dismissal. Instead, the court vacated the judgment but denied a dismissal, retaining the case for trial *de novo.* From such order the plaintiff, whose judgment against defendant was thus vacated, appeals, contending that the order vacating the judgment was not made upon valid grounds, and that the judgment vacated should be reinstated.

The issues involved are decided by the determination of whether the action of the justice court, in failing and refusing to file the affidavit for change of venue and make its order transferring the cause, devested that court of jurisdiction over the subject-matter of this action. If so, then it follows, on the authority of Vidger v. Nolin, 10 N. D. 353, 87 N. W. 593, that the appeal on law and fact and demand for trial *de novo,* conferring appellate jurisdiction only of the person of the appellant by his voluntary act and appearance, could not vest the appellate court with jurisdiction of subject-matter where the lower tribunal did not have jurisdiction of subject-matter.

Manifestly the lower court, at the time of the application for change of venue, had jurisdiction of both person and subject-matter, and therefore was fully vested with authority to determine the cause. The payment of the dollar, and the presenting of the affidavit and application to the justice, were all that were required of the party desiring such change of venue, and it thereupon became the duty of the justice to grant a change of trial and to act under the provisions of § 8377. To all intents and purposes, therefore, the affidavit and application for a change of venue must be considered as filed in justice court after presentation. Does such fact devest the justice of jurisdiction of the cause for all purposes, so as to render an appeal from a judgment, afterwards erroneously rendered, abortive and void as not transferring jurisdiction of subject-matter to the appellate court? This must be answered in the negative. The statute reads: "From the time the order changing the place of trial is made, the court to which the action is thereby transferred has the same jurisdiction over it as though it had been commenced in such court. After an order has been made, transferring the action for trial to another court, the following proceedings must be had." Under the statute jurisdiction to try the cause is superseded or stayed, with no power remaining to proceed or do aught but

order a change of venue (40 Cyc. 155; Orcutt v. Conrad, 10 N. D. 431, 87 N. W. 982), but jurisdiction of the cause is not transferred until the order of transfer is made, which order completely devests the justice court making it of jurisdiction, and clothes with jurisdiction the justice court, designated in the order as the court to which the case is transferred. (4 Enc. Pl. & Pr. 470–486.) Manifestly, jurisdiction previously obtained must, throughout the change, be vested at all times either in the court where the action is brought or the one to which it is transferred; and the statute determines the moment of such change to be the instant of the signing of the order of transfer. Before the making of the order, notwithstanding the affidavit and application for a change of venue may be on file with the justice, jurisdiction of the subject-matter still remains there; and under this record it has always remained in such court wherein the action was begun until devested by the appeal which thereby placed it in the district court. Respondent urges that this motion on affidavit for a change of venue ousts the justice court wherein it is filed of all jurisdiction for all purposes except to transfer the case. In one sense it may be so described (Orcutt v. Conrad, supra), but, strictly speaking, jurisdiction in the court is not ousted, but remains, though superseded or stayed with power limited in exercise to the doing of the ministerial act (10 N. D. 431) of selecting the nearest justice or the justice agreed upon (§ 8376, Rev. Codes 1905) to which the cause is to be transferred for trial, and making the order there transferring it. After the filing of the affidavit and application for change of venue, the justice violated an imperative duty thereby placed upon that court to grant such change of venue, and all proceedings thereafter taking place were void as in excess of its limited jurisdiction. 40 Cyc. 155; Nolan v. McDuffie, 125 Cal. 334, 58 Pac. 4; Woods Gold Min. Co. v. Royston, 46 Colo. 191, 103 Pac. 291; also note to 111 Am. St. Rep. 945, and note to 50 L.R.A. 787, at page 795. The justice court had jurisdiction of the subject-matter, however, but was without power to act judicially. Had the justice court issued its order of transfer it would have clothed the court receiving the cause thereby with full jurisdiction, as it could not create it. Rev. Codes 1905, § 8377; 4 Enc. Pl. & Pr. 487; Johnson v. Erickson, 14 N. D. 414, 105 N. W. 1104. The statute defining jurisdiction alone could do that as to subject-matter. Concededly, the matters in issue were not

in excess of the jurisdiction of the justice court. Hence, Vidger v. Nolin, 10 N. D. 353, 87 N. W. 593; Deardoff v. Thorstensen, 16 N. D. 355, 113 N. W. 616, and similar cases cited by respondent, do not sustain his position concerning this appeal. On the contrary, they support our conclusions when the distinction between jurisdiction of subject-matter and jurisdiction of the person is considered. We quote from that authority from 10 N. D. 359, as follows:

"It is now urged by counsel for said respondent that the section quoted gives the district court original jurisdiction on the appeal, and that the fact that the justice had no power to determine the questions involved in the counterclaims is immaterial. To this contention we cannot agree. Similar enactments are to be found in the justice's Codes of several states. The construction given to this provision by the courts of these states is not in all respects in harmony. But upon the question involved in this appeal such decisions generally hold that, where the justice had no jurisdiction of the subject-matter of the action, the district court could acquire none; and that such district court could not determine the case on the merits by amendment of the pleadings after appeal. In such cases the jurisdiction of the appellate court depends upon the jurisdiction of the justice, so far as the subject-matter of the litigation is concerned." And the court there cites and distinguishes its holding from William Deering & Co. v. Venne, 7 N. D. 576, 75 N. W. 926, a holding that jurisdiction of the person may be conferred by a voluntary appearance in justice court, or by an appeal under a statute then requiring trial anew in the district court, under § 6779, Rev. Codes 1895, and before the enactment of all of § 8501, Rev. Codes 1905, granting an appeal upon questions of law only. Vidger v. Nolin follows Arnegaard v. Arnegaard, 7 N. D. 475, 41 L.R.A. 258, 75 N. W. 797. And for the same reasons these cases are distinguished from Miner v. Francis, 3 N. D. 549, 58 N. W. 343; Benoit v. Revoir, 8 N. D. 226, 77 N. W. 605; and this case at bar. See also extensive note in 34 L.R.A.(N.S.) 666, and the case under which the same is collected of Gulf Pipe Line Co. v. Vanderberg, 28 Okla. 637, 34 L.R.A.(N.S.) 661, 115 Pac. 782; Ann. Cas. 1912 D, 407; and McCubrey v. Lankis, 74 Minn. 302, 77 N. W. 144, on analogous principles. Our statute, § 8358, Rev. Codes 1905, as construed in Heard v. Holbrook, 21 N. D. 348, on page 354,

131 N. W. 251 (distinguishing the earlier holding of Miner v. Francis, 3 N. D. 549, 58 N. W. 343, decided before amendment of 1895 to present § 8358, Rev. Codes 1905), is to the effect that where the lower court had jurisdiction of the subject-matter, an appeal, with demand for trial *de novo* on both law and fact, vests jurisdiction of the person as well, and transfers the cause for trial anew in the appellate court, and such was the legal effect of this appeal. We may grant respondent's contention that the justice court had no jurisdiction except to order a transfer, and hence no jurisdiction to enter a judgment upon the merits, which is sound in law, but still the general appeal and demand for trial *de novo,* under Johnson v. Erickson, 14 N. D. 414, 105 N. W. 1104, and Heard v. Holbrook, supra, must apply and decide this case contrary to respondent's contention. A distinction seems to be drawn in principle between the proceedings occurring in excess of jurisdiction, after the filing of an affidavit of prejudice against the magistrate or judge, as here was done, from such acts done after the filing of a mere demand for change of place of trial. The former is void, the latter held not to be. 111 Am. St. Rep. 947, 948, note.

But we can see no distinction in principle between this case and that of Johnson v. Erickson, supra. There, in a justice court proceeding, title to real property was brought in issue, whereupon, under the statute, it became the duty of the justice to forthwith certify the cause to the district court, but instead of so doing he dismissed it. Upon appeal it was urged the same as here, that the district court was without jurisdiction because of the rule "that the district court by virtue of an appeal succeeds only to the jurisdiction of the justice court, and that where the justice court has no jurisdiction the appellate court acquires none." The court there says: "In this case the justice not only had authority to transfer the case to the district court, but it was his express duty to do so. The distinction between this case, and those where there is no jurisdiction or no authority to transmit, is apparent. In such cases there is neither right nor duty to certify the case, and of course an appeal would not give jurisdiction. . . . The proceedings are irregular, but were made so by the error of the justice in rendering a judgment of dismissal, instead of certifying the case; and for this error the plaintiff is in no way responsible. . . . We are of opinion that when a justice has, by disregarding the statute, made it necessary

to appeal, the district court acquires jurisdiction, and that it is error for the district court to refuse to entertain the action and to dismiss the appeal; and this view is in harmony with the opinion of other courts under similar statutes."

There the justice pronounced an unauthorized judgment when, instead, he should have certified the case to the district court for further proceedings; yet the appeal from such unauthorized judgment was held to vest jurisdiction of the subject-matter in the appellate court, which ordinarily would have been transferred there without appeal by the order of the justice. Here the justice court, having conceded jurisdiction of person and subject-matter, proceeds unauthorizedly, after it had become its mandatory duty to transfer the cause for trial to another justice court, and accordingly enters judgment, void because of want of power to enter any judgment at all, but from which defendant has seen fit to appeal generally upon both law and fact and demand a trial *de novo* in the appellate court. The statutes concerned in Johnson v. Erickson, and in the case at bar, are in effect analogous, both superseding jurisdiction to determine the merits. If an appeal from a void judgment of dismissal, as in Johnson v. Erickson, confers appellate jurisdiction of subject-matter, most certainly under these circumstances the appeal so taken generally must be held to confer jurisdiction of subject-matter as well as person upon the appellate court.

Accordingly the order dated September 8, 1911, vacating the judgment entered October 3, 1910, was not made upon legal grounds, and should be and hereby is ordered to be vacated and set aside, and the judgment of the District Court of Benson county, vacated by such order, is directed to be reinstated. Appellant will recover judgment for costs and disbursements upon this appeal.

CEDAR RAPIDS NATIONAL BANK, a Corporation, v. HONORABLE J. A. COFFEY, as Judge of the Fifth Judicial District of North Dakota.

(141 N. W. 997.)

Mandamus — statement of case — statutory fine — respondent — record on appeal — certification.

On the hearing of an alternative writ of mandamus issued to compel the re-

spondent, as judge of the fifth judicial district, to settle a statement of the case proposed by plaintiff, and to correct or make an additional certificate to the judgment roll on appeal, or to show cause why he has not done so, *held*, that relator is not entitled to the relief prayed for; it appearing that the statutory time prescribed for the settlement of a statement of the case has long since expired, and the time within which to settle a statement of the case has not been enlarged; also, it does not appear that respondent has at any time refused, upon proper request, to certify to the record on appeal.

Opinion filed May 24, 1913.

Original application to the Supreme Court for a writ of mandamus. Alternative writ issued, but dismissed after a hearing on the merits.

George H. Stillman, Carrington, North Dakota, for plaintiff.

Maddux & Rinker, New Rockford, North Dakota, for respondent.

FISK, J. On the application of relator an alternative writ of mandamus was issued out of this court on April 17th, directed to the Honorable J. A. Coffey, as judge of the fifth judicial district, commanding him forthwith to complete and correct a certain record on appeal and the certificate thereto, and to settle and allow plaintiff's proposed statement of the case for use on such appeal, or such statement as accords with the facts, or show cause before this court on April 24th, why he has not done so. On the return day respondent appeared by counsel and first moved to quash such alternative writ, for reasons stated in such motion, and afterwards filed a verified answer to such writ, setting forth ten distinct grounds why such writ should be dismissed, and submitting as a part of such answer or return three affidavits,—one by respondent, one by C. J. Maddux, and the other by C. J. Stickney.

In view of the inevitable conclusion to which we are forced on the merits, we deem it unnecessary to notice respondent's motion to quash the writ, nor do we deem it necessary to notice more than two of the grounds urged as a defense upon the merits.

The affidavit of Maddux is to the effect that notice of the entry of judgment in the case of Cedar Rapids National Bank v. George W. Morrisey was served upon plaintiff's attorneys, Hoopes and Stillman, by depositing the same in the United States mail, postage prepaid, addressed to said attorneys on January 31, 1912; also inclosing therewith a statement of the costs and disbursements as taxed, notice of

retaxation thereof, and a copy of the order for judgment and of the judgment, and that he filed in the clerk's office due proof of such service.

The affidavit of Stickney corroborates that of Maddux, to the effect that on January 31, 1912, the costs in said action were taxed and allowed, and order for judgment and judgment were filed and recorded in said court, and that notice of entry of the judgment was also filed therein on such date, together with an affidavit of service of the notice of final entry of judgment, notice of retaxation of costs, order for judgment, and judgment were filed with him on said date. These affidavits must be accepted by us as conclusive of the facts therein stated. Sec. 7332, Rev. Codes 1905, authorizes service by mail "when the person making the service and the person on whom it is to be made reside in different places between which there is a regular communication by mail." And the following section prescribes the method of service by mail: It reads: "In case of service by mail the paper must be deposited in the postoffice, addressed to the person on whom it is to be served, at his place of residence, and the postage paid." It is true relator's counsel contend that no notice of the entry of judgment was served, but in the light of the affidavits of Maddux and Stickney we must hold that due service was made of such notice, even though the same never in fact reached Hoopes and Stillman. While perhaps not material or controlling, we might here mention the fact that plaintiff's attorneys acquired actual notice of the entry of such judgment shortly thereafter; for an appeal was taken to the supreme court on March 5, 1912, from such judgment. There is no contention that the time in which to settle a statement of the case has ever been enlarged, and under the Code, § 7058, the time in which to settle such statement had long since expired when this application for a writ of mandamus was filed. Manifestly, therefore, the respondent will not be required to settle such statement at this time, and the writ, in so far as this point is concerned, must be denied.

The other relief prayed for by the applicant is that respondent be commanded to forthwith correct the record, or his certificate to the record on appeal, it being contended that only a portion of such record has been certified and transmitted to this court. We apprehend that such relief would be of little avail to plaintiff, in view of our decision

upon the first point. But in any event, we are agreed that, under the showing before us, the petitioner is not entitled to such relief. Respondent, in his return or answer to the alternative writ, states, under oath, that he has not refused to certify the judgment roll, and that no judgment roll has been presented to him with a request to amend the certificate thereto; and in his affidavit he states "that no application was made to the court to amend the certificate to the judgment roll, when the judgment roll was present," and, "that at the time of the issuance of the alternative writ . . . the judgment roll was on file in said supreme court, and has been there at all times since the issuance of said alternative writ." Surely, under these facts, respondent cannot be compelled by mandamus to make the certificate in question.

It follows that the alternative writ should be dismissed, and it is so ordered.

F. PHILLIPS v. T. S. SEMINGSON et al.

(142 N. W. 47.)

Warehouseman — bondsmen — action — pleading — storage tickets — ticket holders — individual holder — benefit of all.

Plaintiff brings action against the bondsmen of a warehouseman for the value of certain wheat storage tickets. *Held*:—

(1) That when suit is brought upon the bond required by § 2247, Rev. Codes 1905, the complaint must show that such action is brought on behalf of all the holders of storage tickets upon which default has been made, and the better procedure is to bring the action in the name of the state for the benefit of said ticket holders. Action by one of many such ticket holders, in his own individual name, will not lie.

Answer — counterclaim — bar — demurrer.

(2) Answer examined, and *held* that the matters set up therein by way of counterclaim do not constitute a bar, and a demurrer thereto was properly overruled.

Opinion filed May 24, 1913.

Appeal from the District Court for Divide County, North Dakota. *Leighton*, J.

Affirmed.

Brace & Points, for appellant.

The nominal obligee in the bond involved in this case is the state; but, the real obligee and the person for whom the law required the bond to be given is anyone who suffers on account of the breach thereof.

Therefore, the plaintiff having been damaged, he becomes the real party in interest. Rev. Codes 1905, § 2247.

The bond is given for the benefit of persons dealing with the warehouseman. State ex rel. Hart-Parr Co. v. Robb-Lawrence Co. 17 N. D. 257, 16 L.R.A.(N.S.) 227, 115 N. W. 864; 15 Enc. Pl. & Pr. 710; Gross v. Heckert, 120 Wis. 314, 97 N. W. 952; Hoagland v. Van Etten, 22 Neb. 681, 35 N. W. 869; Kinsella v. Sharp, 47 Neb. 664, 66 N. W. 634.

The plaintiff being the real party in interest, the action must be prosecuted in his name. Rev. Codes 1905, § 6807; Kerr's Cyc. Code Civ. Proc. 342–344 U. 17; 15 Enc. Pl. & Pr. 77, 710, 719; 3 Enc. Pl. & Pr. 640; Hollister v. Hubbard, 11 S. D. 461, 78 N. W. 949; State v. Newson, 8 S. D. 327, 66 N. W. 468; Custer County v. Albien, 7 S. D. 482, 64 N. W. 533.

Parties belonging to a certain class who are intended to be protected by such a bond can sue in their own names. Moede v. Haines, 66 Minn. 419, 69 N. W. 216; Milwaukee v. United States Fidelity & G. Co. 144 Wis. 603, 129 N. W. 786.

Such action need not be brought in name of the state. State v. Wettstein, 64 Wis. 234, 25 N. W. 34.

The beneficiary is the real party in interest. Platteville v. Hooper, 63 Wis. 381, 23 N. W. 581; McLean v. State, 8 Heisk. 22; Lay v. State, 5 Sneed, 607; 1 Kinkead, Code Pl. § 347; Barker v. Wheeler, 71 Neb. 740, 99 N. W. 548; Pickle Marble & Granite Co. v. McClay, 54 Neb. 661, 74 N. W. 1062.

Such action must be brought in the name of the real party in interest, and *not* in the name of the party holding the legal title for the benefit of the party in interest. Sample v. Hale, 34 Neb. 220, 51 N. W. 837; Lyman v. Lincoln, 38 Neb. 794, 57 N. W. 531; Kaufmann v. Cooper, 46 Neb. 644, 65 N. W. 796; Doll v. Crume, 41 Neb. 655, 59 N. W. 806; Hickman v. Layne, 47 Neb. 177, 66 N. W. 298; Fitzgerald v. McClay, 47 Neb. 816, 66 N. W. 828; Rohman v. Gaiser, 53 Neb. 474, 73 N. W. 923; Baker v. Bartol, 7 Cal. 551; Barker v.

Wheeler, 71 Neb. 740, 99 N. W. 548; Lake County v. Schradsky, 31 Colo. 178, 71 Pac. 1104; Rice v. Savery, 22 Iowa, 470; St. Louis, K. C. & N. R. Co. v. Thacher, 13 Kan. 564; Weide v. Porter, 22 Minn. 429; Sloman v. Great Western R. Co. 67 N. Y. 208; Hall v. Plaine, 14 Ohio St. 423.

Even though the state is trustee of an express trust—as obligee in the bond—still the real party in interest may sue in his own name. Sutherland Pl. § 14, and cases cited.

Statutes are *in pari materia* which relate to the same person or thing, or to same class of persons or things. Rev. Codes 1905, §§ 2247–2264; United Soc. v. Eagle Bank, 7 Conn. 457; People v. Aichinson, 7 How. Pr. 245; Waterford & W. Turnpike v. People, 9 Barb. 169; Highgate v. State, 59 Vt. 39, 7 Atl. 898; O'Neal v. Robinson, 45 Ala. 535; Plummer v. Murray, 51 Barb. 202; 26 Am. & Eng. Enc. Law, 621, 622.

The bond sued upon herein is a statutory bond. The statutory conditions contained in the bond are valid and enforceable, even though the bond contains many other conditions—such additional conditions may be rejected as surplusage. Murfree, Official Bonds, §§ 36, 430; State ex rel. Griffith v. Purcell, 31 W. Va. 44, 5 S. E. 301; Johnson v. Erskine, 9 Tex. 9; Hedderick v. Pontet, 6 Mont. 345, 12 Pac. 765; Milwaukee v. United States Fidelity & G. Co. 144 Wis. 603, 129 N. W. 786; 5 Cyc. 751, and cases cited.

The purpose of this statutory bond is to provide security for those dealing with the warehouseman giving the bond. State ex rel. Hart-Parr Co. v. Robb-Lawrence Co. 17 N. D. 257, 16 L.R.A.(N.S.) 227, 115 N. W. 864; 5 Cyc. 752, 754, 756, and cases cited; Brandt, Suretyship & Guaranty, § 82.

The plaintiff is not required first to sue the principal and obtain judgment. Such is not a condition precedent to an action upon the bond. Douglass v. Howland, 24 Wend. 35; M'Kellar v. Bowell, 11 N. C. (4 Hawks) 34; Murfree, Official Bonds, §§ 490, 491, 492; 5 Cyc. 822; Yerxa v. Ruthruff, 19 N. D. 13, 25 L.R.A.(N.S.) 139, 120 N. W. 758, Ann. Cas. 1912 D, 809.

Geo. Cudhie, for respondents.

A general demurrer to the answer searches the record and attaches to the first defect in the pleadings. Tribune Printing & Binding Co.

v. Barnes, 7 N. D. 591, 75 N. W. 904; Hower v. Aultman-Miller & Co. 27 Neb. 251, 42 N. W. 1039; Hawthorne v. State, 45 Neb. 871, 64 N. W. 359; State ex rel. Broatch v. Moores, 52 Neb. 770, 73 N. W. 299.

The plaintiff should allege and prove a demand for the grain or its value; also an offer to return the storage receipts, and a tender and refusal of the storage charges. First Nat. Bank v. Young, 20 Wash. 337, 55 Pac. 215; Baker v. Born, 17 Ind. App. 422, 46 N. E. 930; Jemison v. Birmingham & A. R. Co. 125 Ala. 378, 28 So. 51; Best v. Muir, 8 N. D. 44, 73 Am. St. Rep. 742, 77 N. W. 95; Plano Mfg. Co. v. Jones, 8 N. D. 315, 79 N. W. 338; Towne v. St. Anthony & D. Elevator Co. 8 N. D. 200, 77 N. W. 608; First Nat. Bank v. Minneapolis & N. Elevator Co. 11 N. D. 280, 91 N. W. 436; Burr v. Dougherty, 21 Ark. 559.

Such an action must be maintained in the name of the state. The property of a decedent descends, chargeable with the payment of his debts. But, to charge the estate with such debts, the procedure outlined by the Code is necessary.

The claim here in suit was never presented to the administrator. Rev. Codes § 5084; Rev. Codes, §§ 8097, 8099–8105.

The liability of the bondsmen is measured by the terms and conditions of the bond. 5 Cyc. 758.

Such liability cannot be determined by the liability of the principal. 29 Cyc. 1454, and cases cited; McPhee v. United States Fidelity & G. Co. 52 Wash. 154, 21 L.R.A.(N.S.) 535, 132 Am. St. Rep. 958, 100 Pac. 174; Rev. Codes, § 2247.

Sureties who have undertaken to be responsible for the principal within certain territory, are not responsible for his acts elsewhere. 32 Cyc. 110.

BURKE, J. The complaint in this action is too lengthy to be given verbatim, but is substantially as follows: That on the 21st day of September, 1909, one James J. Ryder commenced business as a public warehouse and elevator man in the village of Crosby, North Dakota, and that for the purpose of obtaining the license required by § 2247, Rev. Codes 1905, he furnished a bond signed by the defendants in this action, running to the state of North Dakota in the sum of $5,-

000. That the bond so given contained the following provision: "Now, therefore, if the said James J. Ryder shall faithfully and lawfully perform all duties as public warehouseman, and comply with all the laws of the state of North Dakota relative thereto, and the rules and regulations adopted by the board of commissioners of said state in connection therewith, and shall pay all sums for which he shall be adjudged to be liable in any way by any of the creditors of the state of North Dakota by reason of the laws of said state, or the rules and regulations of said board, then this obligation is to become null and void, otherwise to remain in full force and effect."

That during the months of October and November, 1910, the plaintiff delivered to said Ryder at the public warehouse conducted by him, 736 bushels and 40 pounds of No. 1 hard wheat, and received therefor storage tickets in due form; that said wheat belonged to the plaintiff and was of the value of 95 cents per bushel. That on or about the 31st of December, 1910, the said Ryder closed the said warehouse, leaving no one in charge thereof; and that on or about the 13th of January, 1911, the said Ryder appointed the Security State Bank of Crosby as agent, with authority to redeem all outstanding warehouse receipts, but that on the 21st day of January, 1913, said bank ceased to redeem such receipts, for the reason that they had exhausted the funds furnished them by Ryder. That about the 11th day of February, 1911, the said Ryder died and an administrator was appointed for his estate. That plaintiff had demanded that the said administrator deliver to him said wheat, or its equivalent in money, both of which have been refused, by reason of which facts plaintiff asked judgment against the bondsmen for the value of said wheat. The defendants' answer practically admitted all of the allegations of the complaint, but alleged as an affirmative defense new matters as follows: First, that said Ryder had removed his elevator from its original site to another lot in the village of Crosby, without the consent of his said bondsmen; second, that the license issued by the state to said Ryder was contrary to the provisions of the bond, in that it authorized Ryder to continue business for a period beyond that designated in the bond; and, third, that said Ryder was never at any time adjudged to be liable to plaintiff for any sum arising out of the performance or nonperformance of any of his

duties as warehouseman by any of the creditors of this state, and that no action was ever commenced against Ryder or his administrator.

To this answer the plaintiff interposed a demurrer upon the grounds that it did not state facts sufficient to constitute a defense. Upon a hearing, the trial court took the position that all of the facts alleged in the complaint and answer were admitted, and that therefore nothing remained but to decide the law. In other words, he treated the hearing as a trial upon issues of law alone, or, as stated by the respondent, it was considered that the demurrer to the answer searched the record. Upon the said hearing the trial court held that the complaint of the plaintiff herein did not state a cause of action in favor of the plaintiff, and this appeal is from that holding.

(1) The appellant, in his brief, recognizes this proposition as follows: "In sustaining the demurrer of the defendant, the court necessarily held that the action could not be maintained by this plaintiff, since he is not the obligee named in the bond." We have examined authorities cited by appellant with care, but they do not seem to be in point. The gist of said decisions is that the action must be maintained by the real party in interest, which is undoubtedly correct as a legal proposition, but it does not necessarily follow that the plaintiff is the real party in interest in this action. Section 2247, Rev. Codes 1905, provides that the bond shall be given to the state, and "shall be in sufficient amount to protect the holders of outstanding tickets." This bond is given for the benefit of *all* ticket holders, and not for the benefit of any particular one. Plaintiff is therefore only a small part of the real party in interest. Section 6809, Rev. Codes 1905, provides that a trustee of an express trust, or a person expressly authorized by statute, may sue without joining with him the person for whose benefit the action is prosecuted. Under these provisions South Dakota has held that the suit *may* be in the name of the state, without deciding whether it may also be brought by the beneficiaries. State v. Newson, 8 S. D. 327, 66 N. W. 468; other cases cited by appellant are based upon dissimilar facts to those at bar; for example, when the bond given is for the protection of one particular person interested, and not for a class of persons. The nearest authority that we have been able to find was contained in the following cited New York cases: In 1907 the New York state legislature passed an act requiring all persons engaged in

the selling of steamship tickets, and who in connection therewith received deposits of money to be transmitted to foreign countries, to execute and deliver a bond to the state for the faithful transmission of such money. Said act being very similar in its nature to our warehousemen's act. In case of Guffanti v. National Surety Co. 133 App. Div. 610, 118 N. Y. Supp. 207, it was held that the action must be brought in equity on behalf of all of the beneficiaries, and that an action would not lie in favor of any one individual beneficiary. The reasoning in that case is very strong, and we will quote extracts therefrom: "The remaining question is whether the plaintiff can maintain the action in its present form. The undoubted purpose of the statute is to . . . provide a fund to indemnify creditors. By requiring a bond to be given, a fund is provided for the payment of such creditors; such fund, I think, is not for one creditor but for all, and should be equitably distributed among all according to their respective claims. It cannot be that the legislature intended that the benefits to be derived from the bond were solely for the most diligent creditor if his claim happened to be in excess of the penalty of the bond; nor do I think it can be said, when the purpose of the statute is taken into consideration, that it was intended that each creditor, no matter what the amount of his claim might be, should be compelled to maintain an action at law, but, on the contrary, any one creditor might maintain an action on behalf of himself and all others similarly situated. An action at law by one creditor solely on behalf of himself is entirely inconsistent with the purpose for which the bond was required or given." See also Terry v. Little, 101 U. S. 216, 25 L. ed. 864, wherein it is said: "The remedy must always be such as is appropriate to the liability to be enforced. . . . If the object is to provide a fund out of which all creditors are to be paid, share and share alike, it needs no argument to show that one creditor should not be permitted to appropriate to himself, without regard to the rights of others, that which is to make up the fund." See also Hirshfeld v. Fitzgerald, 157 N. Y. 166, 46 L.R.A. 839, 51 N. E. 997, wherein it is said: "The object of this statute was undoubtedly to furnish additional security to creditors, and is for the benefit of them all, and should be enforced by or on behalf of all." This holding of the New York supreme court was followed in Cappadonna v. Illinois Surety Co. 68 Misc. 470, 125 N. Y. Supp. 162, which

was an action under the same New York statute. In that case the bond was limited to the sum of $15,000, and suits by individuals had been brought and the surety company had paid the entire sum in judgments upon these suits. Notwithstanding these facts, when suit was brought in equity by one of the remaining creditors for and upon behalf of all of the creditors, his suit was maintained and the payment to the individuals was held to be no bar. This holding was upheld again in Lordi v. People's Surety Co. 69 Misc. 598, 126 N. Y. Supp. 180. The reasoning of the New York court appeals to us and will be followed in this case. In addition to the reasons therein given, we might state that as the bond is given for the benefit of the creditors of the warehouse the entire amount of the penalty should be conserved for their benefit. If each individual ticket holder brought an individual suit, the same might be so numerous and the costs so large that the $5,000 required in this case might be exhausted in the payment of said $3,000 defalcation. And again if individual suits were allowed, there would be many chances for collusion between the first litigants and the bondsmen. We think it best to adopt a rule in this state that the actions upon the warehousemen's bond may be instituted by any creditor, but must be brought on behalf of themselves and all others similarly situated. As § 6809, Rev. Codes 1905, authorizes this action to be brought in the name of the state for the benefit of the beneficiaries, we think it better to entitle the action in that manner. It thus appears that the complaint was fatally defective, and that the order of the trial court was correct.

(2) Though the holding in ¶ 1 disposes of this case, we might say that we do not believe the matters pleaded as a defense in the answer of the defendant constitute a bar to this action. A perusal of the bond does not bear out the contention of the defendants that the license was improperly issued by the railroad commissioners, nor do we think it material that the elevator was moved a short distance within the same village, nor that any judgment was ever recovered against Ryder. The bond has many conditions besides that which provides that the sureties will pay any judgments obtained against Ryder. The order of the trial court is in all things affirmed. This decision, however, is to be without prejudice to the bringing of the proper action in equity as outlined above.

F. H. SQUIRE v. COUNTY COURT OF WARD COUNTY, NORTH DAKOTA.

(141 N. W. 1135.)

Opinion filed May 24, 1913. Rehearing denied May 28, 1913.

Original application for a writ of certiorari.
Application denied.
William Lemke Fargo, for petitioner.

PER CURIAM. The petitioner has presented to this court his petition for a writ of certiorari directed to the county court of Ward county, wherein it is sought to have this court review the action of said county court in refusing to grant a change of venue to the county court of Cass county in a certain action there pending, entitled "F. B. Lambert, plaintiff, v. F. Howard Squire, defendant," wherein, among other proceedings had, a demand for change of venue was made by this petitioner and denied by said court. The writ will not be issued; it being apparent that plaintiff had an adequate remedy by appeal, as has been determined in Robertson Lumber Co. v. Jones, 13 N. D. 112, 99 N. W. 1082, wherein it was held that an order granting a change of venue in a civil action involves the merits, and is appealable; hence under § 7810, Rev. Codes 1905, certiorari will not lie. Other reasons also appear as to why the petition should be denied, but as this one ground of denial is conclusive it is unnecessary to discuss the others. The petition is therefore denied.

Note.—For authorities upon the rule that remedy by appeal precludes resort to certiorari, see note in 103 Am. St. Rep. 111, and for the exceptions to this rule, see note in 50 L.R.A. 787.

GEORGE HOUSTON v. MINNEAPOLIS, ST. PAUL, & SAULT STE. MARIE RAILWAY COMPANY.

(46 L.R.A.(N.S.) 589, 141 N. W. 994.)

Motion for judgment non obstante — order denying — nonappealable.

1. Following Turner v. Crumpton, recently decided by this court, ante, 134, *held*, that an order denying a motion for judgment *non obstante veredicto* is nonappealable.

Supreme court — power — order — judgment — non obstante veredicto — motion — district court.

2. *Held*, construing § 7044, Rev. Codes 1905, that this court in a proper case has power, on appeal, to order judgment *non obstante veredicto*, although no motion was made in the lower court for judgment notwithstanding the verdict or for a new trial.

Testimony — statement — motion to strike — rules of court.

3. Where, as in this case, the testimony is very brief and consists of but a few printed pages, a motion to strike the statement from the abstract for failure to conform strictly to rule 7 of this court, requiring such testimony to be reduced to the narrative form, will be denied.

Railways — conductor — police officer — passengers — arrest — evidence — liability of company.

4. Plaintiff, who was a passenger on defendant's train from B. to M., was wrongfully arrested at the instance of defendant's conductor, about five minutes after alighting from the train at M., and while standing on the depot platform conversing with his companions.

Held, for reasons stated in the opinion, that whether at the time of such arrest, plaintiff's status as a passenger had ceased, so as to exonerate the company from any duty as a carrier towards him, was, under the facts disclosed

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Note. — The authorities upon the carrier's liability for arrest by special police officers appointed by public authority are collated in notes in 23 L.R.A.(N.S.) 289 and 30 L.R.A.(N.S.) 481.

Upon the question of the carrier's liability for arrest or false imprisonment by servant employed as detective, policeman, or watchman, see notes in 4 L.R.A.(N.S.) 282, and 28 L.R.A.(N.S.) 88. And as to the liability of carrier for wrongful arrest of passenger by servant, generally, see notes in 7 L.R.A.(N.S.) 162; 34 L.R.A.(N.S.) 299; and 32 Am. St. Rep. 100.

Upon the duty to protect passenger from arrest, see note in 32 L.R.A.(N.S.) 526. And for the limit of the carrier's absolute obligation to protect passengers from wrongful arrest, see note in 40 L.R.A.(N.S.) 1073.

by the evidence, not material or controlling, as such conductor was not at the time acting for the company, but as a policeman for the state pursuant to the duty imposed upon him under the provisions of chapter 228, Laws 1911, and the company is not liable for his acts.

Opinion filed May 3, 1913. Rehearing denied May 31, 1913.

Appeal from County Court, Ward County; *N. Davis,* J.

From a judgment in plaintiff's favor, defendant appeals.

Reversed with directions.

Palda, Aaker, & Greene, for appellant; *Alfred H. Bright, John L. Erdall,* of counsel.

At the time of the claimed assault and arrest of the plaintiff, the relation of carrier and passenger had ceased between defendant and plaintiff, and the defendant, at such time, owed the plaintiff no duty that might arise out of such relationship. Ware v. Barataria & L. Canal Co. 15 La. 169, 35 Am. Dec. 201.

As a general rule the relation of passenger and carrier terminates when, upon arrival at his destination, the passenger alights and has a reasonable time to depart in safety from the premises of the carrier. 4 Elliott, Railroads, ¶ 1592; Glenn v. Lake Erie & W. R. Co. 165 Ind. 659, 2 L.R.A.(N.S.) 872, 112 Am. St. Rep. 255, 75 N. E. 282, 6 Ann. Cas. 1032, 19 Am. Neg. Rep. 7; Heinlein v. Boston & P. R. Co. 147 Mass. 136, 9 Am. St. Rep. 676, 16 N. E. 698; Chicago, R. I. & P. R. Co. v. Wood, 44 C. C. A. 118, 104 Fed. 663.

Upon the plaintiff's arrival at the station, he left the train of defendant, and by his own act broke the continuity of his journey and thereby terminated at once his relation as defendant's passenger. Glenn v. Lake Erie & W. R. Co. 165 Ind. 659, 2 L.R.A.(N.S.) 872, 112 Am. St. Rep. 255, 75 N. E. 282, 6 Ann. Cas. 1032, 19 Am. Neg. Rep. 7; Heinlein v. Boston & P. R. Co. 147 Mass. 136, 9 Am. St. Rep. 676, 16 N. E. 698.

E. R. Sinkler, for respondent.

The statement of the case is only a copy of the stenographer's notes. It is not in narrative form, and is not in compliance with the rules of court, and must be stricken out. Rev. Codes 1905, § 7058; Rule VII. of the supreme court, 10 N. D. XLII.; Thuet v. Strong, 7 N. D. 565, 75 N. W. 922; O'Keefe v. Omlie, 17 N. D. 404, 117 N. W. 353.

The motion for judgment notwithstanding the verdict should be made on the reception of the verdict, or at least within the time when a motion for a new trial can be made. Marshalltown Stone Co. v. Des Moines Brick Mfg. Co. — Iowa, —, 101 N. W. 1124; Scheible v. Hart, 11 Ky. L. Rep. 607, 12 S. W. 628; State v. Commercial Bank, 6 Smedes & M. 218, 45 Am. Dec. 280.

Motion for judgment notwithstanding the verdict cannot be granted where there is any substantial evidence sustaining the verdict. Richmire v. Andrews & G. Elevator Co. 11 N. D. 453, 92 N. W. 820; 2 Enc. Pl. & Pr. 912; Cruikshank v. St. Paul F. & M. Ins. Co. 75 Minn. 266, 77 N. W. 958.

It should appear that the moving party is entitled to judgment as a matter of law. Marquardt v. Hubner, 77 Minn. 442, 80 N. W. 617; Bragg v. Chicago, M. & St. P. R. Co. 81 Minn. 130, 83 N. W. 511; Merritt v. Great Northern R. Co. 81 Minn. 496, 84 N. W. 321; Kerr v. Anderson, 16 N. D. 36, 111 N. W. 614; Ætna Indemnity Co. v. Schroeder, 12 N. D. 110, 95 N. W. 436; Meehan v. Great Northern R. Co. 13 N. D. 432, 101 N. W. 183.

From a right to a directed verdict it does not necessarily follow that the party is entitled to a judgment *non obstante veredicto* in the supreme court. American Nat. Bank v. Lundy, 21 N. D. 167, 129 N. W. 99.

Where there are no specifications showing wherein the verdict is contrary to law, or the evidence, nor errors in the instructions pointed out, a motion for judgment notwithstanding the verdict should be denied. Pease v. Magill, 17 N. D. 166, 115 N. W. 260; State use of Part-Parr Co. v. Robb-Lawrence Co. 17 N. D. 257, 16 L.R.A.(N.S.) 227, 115 N. W. 846; Sim v. Rosholt, 16 N. D. 77, 11 L.R.A.(N.S.) 372, 112 N. W. 50; Pine Tree Lumber Co. v. Fargo, 12 N. D. 360, 96 N. W. 357; Welch v. Northern P. R. Co. 14 N. D. 19, 103 N. W. 396.

The conductor was acting in the capacity of a peace officer. He ordered plaintiff's arrest in that capacity. Rev. Codes 1905, § 9755.

A railroad company is liable for the wrongful acts of its agents as peace officers. King v. Illinois C. R. Co. 69 Miss. 245, 10 So. 42; Gillingham v. Ohio River R. Co. 35 W. Va. 588, 14 L.R.A. 798, 29 Am. St. Rep. 827, 14 S. E. 243; Schmidt v. New Orleans R. Co. 7 L.R.A.(N.S.) 162, and notes, 116 La. 311, 40 So. 714; Elser v. South-

ern P. R. Co. 7 Cal. App. 493, 94 Pac. 852; Eichengreen v. Louisville & N. R. Co. 96 Tenn. 229, 31 L.R.A. 702, 54 Am. St. Rep. 833, 34 S. W. 219; Palmeri v. Manhattan R. Co. 133 N. Y. 261, 16 L.R.A. 136, 28 Am. St. Rep. 632, 30 N. E. 1001; Atchison, T. & S. F. R. Co. v. Henry, 55 Kan. 715, 16 L.R.A. 465, 41 Pac. 952, 8 Am. Neg. Cas. 280; Krulevitz v. Eastern R. Co. 143 Mass. 228, 9 N. E. 613; Lynch v. Metropolitan Elev. R. Co. 90 N. Y. 77, 43 Am. Rep. 141; Rown v. Christopher & T. Street R. Co. 34 Hun, 471; 20 Am. & Eng. Enc. Law, 173.

What under all the circumstances is a reasonable time for a passenger to leave the premises after alighting from the train is a question of fact for the jury. The plaintiff in this case was still a passenger of defendant when arrested. Powell v. Philadelphia & R. R. Co. 220 Pa. 638, 20 L.R.A.(N.S.) 1019, 70 Atl. 268; Houston & T. C. R. Co. v. Batchler, 37 Tex. Civ. App. 116, 83 S. W. 902; Messenger v. Valley City Street & Interurban R. Co. 21 N. D. 82, 32 L.R.A.(N.S.) 881, 128 N. W. 1023; Hodges v. Southern P. R. Co. 3 Cal. App. 307, 86 Pac. 620; Chicago, R. I. & P. R. Co. v. Wood, 44 C. C. A. 118, 104 Fed. 663; Texas & P. R. Co. v. Dick, 26 Tex. Civ. App. 256, 63 S. W. 895, 10 Am. Neg. Rep. 196; St. Louis South Western R. Co. v. Wallace, 32 Tex. Civ. App. 312, 74 S. W. 586; McDade v. Norfolk & W. R. Co. 67 W. Va. 582, 68 S. E. 378.

Fisk, J. This action was tried in the county court of Ward county before a jury, and resulted in a verdict in plaintiff's favor for the sum of $750 on October 31, 1911. Thereafter and on December 28th, judgment was duly rendered on such verdict. On December 4th counsel for defendant served upon plaintiff's attorneys a notice that on December 12th they would make a motion for judgment in favor of defendant notwithstanding the verdict and for an order granting a new trial, in the event such motion for judgment should be denied. Such motion designated but one ground thereof, to wit, insufficiency of the evidence to justify the verdict. On January 12, 1912, the parties appeared before the court, whereupon counsel for defendant moved the court for judgment notwithstanding the verdict, without incorporating therewith a motion for a new trial. Objections were filed by plaintiff's counsel to the hearing of such motion, upon the ground that it came

too late, and that no notice of intention to move for a new trial was ever served. Thereupon the trial judge made an order denying the motion, and the defendant attempts to appeal from such order, as well as from the judgment. The order, if treated merely as an order denying the motion for judgment notwithstanding the verdict, is nonappealable, as we have recently held in Turner v. Crumpton, ante, 134, 141 N. W. 209. It is unnecessary, however, to waste any time upon such question of practice, for the only proposition attempted to be urged by appellant by its motion is raised on the appeal from the judgment; namely, that the court erred in denying defendant's motion for a directed verdict at the close of the testimony. If the trial court should have directed a verdict, this court has the power to do so on the appeal from the judgment, even though no motion was made in the lower court for judgment notwithstanding the verdict or for a new trial. Such appears to be the plain provision of § 7044, Rev. Codes 1905.

This brings us to a consideration of the appeal from the judgment. Respondent has made a motion in this court to strike out the statement of the case for failure to comply with rule 7 of this court, which requires the testimony to be reduced to narrative form. While this court will ordinarily require a strict compliance with such rule, as held in numerous cases, yet, owing to the exceptionally short record, the testimony in which comprises but a few pages, we have concluded not to enforce such strict compliance in the case at bar. The only testimony introduced is that of the plaintiff, defendant offering no testimony whatever, and the only specifications of error incorporated in the settled statement are predicated upon the rulings of the court in denying defendant's motions for a directed verdict.

Plaintiff testifies in substance that on July 22, 1911, he was a passenger on one of defendant's passenger trains en route from Burlington to Minot, having purchased a ticket at Burlington entitling him to ride on such train to Minot. During such trip one Ole Johnson, also a passenger on said train, approached plaintiff and offered him a drink, which plaintiff declined, whereupon the conductor of the train jumped up and grabbed the bottle from Johnson, and kept it, saying at the same time: "When I get to Minot I will have you fellows arrested." He also testified that upon the arrival of the train at Minot he and his companions alighted from the train to the depot platform, but saw no

officer there at that time. A few minutes thereafter an officer arrived, and the conductor pointed to plaintiff and two companions saying, "That is them there," whereupon the officer said to plaintiff and such companions, "Come with me," and they were arrested and taken to jail. While the officer was taking these parties away from the depot, said conductor, holding the bottle in his hand, said, "Here is enough to convict the boys." Upon arrival at the jail, plaintiff and his companions were incarcerated therein, where they were confined from about 1 o'clock P. M. until about 7 P. M., when they were released. On cross-examination plaintiff testified that it was about five minutes, as near as he could judge, from the time he left the train until the arrest was made, and that he had no business which detained him or kept him waiting on the depot platform during such interval of five minutes, and the only reason he gave for remaining there was that he and his companions were "just talking back and forth is all I know." The cross-examination of plaintiff discloses that the bottle in question contained whisky.

The foregoing is all the testimony which is material to the question involved. At the close of such testimony the defendant's counsel moved for a directed verdict upon the ground "that the testimony on the part of the plaintiff is wholly insufficient to establish a cause of action, the issue as alleged in the complaint, or otherwise; it appearing from the testimony that no officer or employee in charge of the train or in the employ of the defendant arrested, in the course of the discharge of any duty or obligation of his to the company, the plaintiff in this case, or that he arrested him at all. The complaint charges that the defendant, through its servants and employees on the occasion described, did wrongfully assault and arrest the plaintiff, and deprive him of his liberty, which allegation is wholly unsupported by any evidence so far offered or by any evidence offered by the plaintiff." Such motion was denied and an exception taken, and this ruling is the sole error specified in the settled statement of the case. While one of the assignments of error in appellant's brief is that the court erred in overruling appellant's motion for judgment notwithstanding the verdict, such assignment is not properly before us, for reasons heretofore stated.

Was it error to deny defendant's motion for a directed verdict? This is the sole question in the case.

Counsel for appellant argue that the proof discloses that, prior to the arrest, the relation of carrier and passenger between defendant and plaintiff had ceased, and consequently that defendant owed plaintiff no duty which such a relation might impose upon it. That any act of the conductor performed towards or connected with such arrest five minutes after plaintiff alighted from the train, and while he was on the depot platform, was without the scope of his duty as defendant's servant, and consequently defendant is in no manner accountable therefor. They, of course, concede the general rule of liability of a master for the wrongful acts of its servants, when performed within the scope of such servants' employment. The crucial question on this appeal, therefore, is whether defendant is responsible for the acts of its conductor, of which plaintiff complains. The appellant contends that no such responsibility exists, if plaintiff, at the time of the arrest, had ceased to be a passenger; and, further, that the right of action alleged is founded upon such relation, and no recovery can be sustained if such relation had ceased at the time of the acts complained of. While, on the contrary, defendant contends that such is not a necessary or proper test of liability, and that defendant is liable under the undisputed facts, even though the court should hold, as a matter of law, that the relation of carrier and passenger had ceased at the time of such wrongful arrest.

As we view the matter, it is not material whether at the time of the arrest the status of plaintiff as a passenger had ceased, or had not ceased; for under the plaintiff's own version of the facts the company on no theory can be held liable for such arrest, for the obvious reason that such conductor, in doing what he did, was not acting for the company, but was discharging a duty imposed upon him by law. The acts complained of were not done within the real or apparent scope of the master's business, and consequently the latter cannot be held responsible for such acts under any rule known to the law. Instead of acting or assuming to act for the company, such conductor was manifestly attempting to discharge what he deemed a duty imposed upon him by chapter 228, Laws 1911. Section 1 of this law makes it a crime to publicly drink or offer to another any intoxicating beverage upon a

train carrying passengers in this state, with certain enumerated exceptions. Section 2 confers police powers upon every passenger conductor, and makes it his *duty,* while thus engaged, to arrest any person who shall, in his presence or to his knowledge, violate the provisions of § 1, and to deliver such person to any policeman, constable, or other peace officer, to be by him informed against and prosecuted.

Is it possible that the common carrier can be held responsible for the faithful and proper discharge of such statutory duty thus imposed upon its servant? We think not, nor has the legislature by such act attempted to impose any such burden upon it. While acting in obedience to such statute, it cannot be said that the conductor is acting for the railway company at all. Such company has no control over him whatsoever while he is in the discharge of the duty thus imposed upon him by the sovereign power of the state.

The authorities relied on by respondent are clearly distinguishable from the case at bar. They are cases where the servant, in doing the act complained of, was acting *for* the master, either within the actual or implied scope of his employment, or such acts were violative of the implied contract of the master for the protection of its passengers.

In announcing the foregoing conclusion, we are not unmindful of the numerous authorities holding a railway company liable for the acts of its servants committed within the scope of their authority, or even for acts which are done not for the benefit of the master or within the scope of authority, provided such acts are violative of the master's implied contract of protection and proper treatment of its passengers at the hands of its servants, which the courts generally hold is a part of the contract of carriage. The latter liability did not exist at common law, the rule formerly being that the master was not liable for the torts of a servant committed wilfully, and not for the benefit of the master. This added responsibility of the carrier is not unjust or intrinsically harsh, for the carrier has a measure of protection by using due care in the selection of its servants. A very different situation, however, is presented in the case at bar. Chapter 228, Laws 1911, creates a new offense, a new *malum prohibitum* as above stated, which makes it unlawful to publicly drink or offer another an intoxicating beverage upon a railway train. It imposes no duty upon the railway company, but confers police power upon every conductor, and imposes

a specific duty upon him with reference to the enforcement of such law. In discharging such duty the conductor does so, not in order to protect the other passengers, nor to carry out the master's implied contract to protect such passengers, nor in violation of the protection which the company owes to the particular passenger, but, as before stated, at the behest and command of the sovereign state. He acts for the state, not the railway company, and the former's interests alone are controlling of his acts. The legislature, in its wisdom, saw fit to place the duty to enforce this law, not upon the railway companies, but upon their conductors. Their responsibility and duty in such cases is not to their companies, but to the state. It logically follows that the companies have no voice in the matter; and even though deemed detrimental to their interest, the enforcement of said statute cannot in any legal manner be controlled by them. Manifestly, therefore, the framers of the statute in question never intended to impose a liability on the railway companies in such cases; it being clearly their intention that, in the enforcement of such statute, the conductor should be deemed an officer of the state, and not of the company. There is no difference between this case and one where a constable or sheriff makes an arrest upon a railway train or at a railway station. In such a case it is clear that the railway company would not be liable for an abuse or an improper exercise of such official duty. It is very doubtful, indeed, whether the carrier could be legally subjected to such responsibility; but it is not necessary for us to determine such question, as by such statute the legislature has not attempted to do this. It would be different, as held in numerous cases, if the conductor had been vested merely with police powers to be exercised at his own or the company's behest, and for the benefit of the company. See 3 Elliott, Railroads, § 1265, and cases cited; Gillingham v. Ohio River R. Co. 35 W. Va. 588, 14 L.R.A. 798, 29 Am. St. Rep. 827, 14 S. E. 243; Dickson v. Waldron, 135 Ind. 507, 24 L.R.A. 483, 488, 41 Am. St. Rep. 440, 34 N. E. 506, 35 N. E. 1. But it is held that where he may act in either one of two capacities,—as a policeman for the state or as a servant for the master,—the presumption would be that he acted in the former capacity. Jardine v. Cornell, 50 N. J. L. 485, 14 Atl. 590; Foster v. Grand Rapids R. Co. 140 Mich. 689, 104 N. W. 380, 18 Am. Neg.

Rep. 479. See also Tolchester Beach Improv. Co. v. Steinmeier, 72 Md. 313, 8 L.R.A. 846, 20 Atl. 188.

In Jardine v. Cornell, supra, we quote the following: "The act of the police in removing the plaintiff from the train to the station house was a continuous one; it was their duty as officers of the law to do so, and it was not within the scope of their employment in enforcing the regulations of the railroad company. Upon an undisputed state of the facts the question presented is for the court. Where a police officer takes a disorderly person from the scene of his disorder to the police station, it will be presumed to have been done in his official character, unless such presumption is repugnant to some rule of law or is rebutted by the facts of the case."

Counsel for respondent calls our attention to § 9755 of the Revised Codes, which makes railroad companies responsible for the acts of its conductors or other persons employed by it, while acting as peace officers, under the provisions of article 8 of chapter 6 of the Code of Criminal Procedure. Such article authorizes railway companies, at their own expense, to employ persons as peace officers for the protection of their property or the preservation of order on their premises, etc., and it is perfectly proper that the legislature should have imposed upon the companies the responsibility for the acts of such peace officers. Manifestly, however, the provisions of article 8, aforesaid, can have no application to the case at bar, for reasons which, we think, are made plain in a prior portion of this opinion.

We are agreed that under the undisputed facts as narrated by the plaintiff the recovery cannot be upheld, and that it was the duty of the court to have granted defendant's motion for a directed verdict.

The judgment is reversed, and the lower court will vacate the same and enter a judgment dismissing the action.

GERMAN MERCANTILE COMPANY, a Corporation, v. JOHN P. WANNER.

(142 N. W. 463.)

Domestic corporations — action — note — capital stock — constitution — property.

1. In an action brought by plaintiff, a domestic corporation, on a promissory note given it by defendant for 20 shares of plaintiff's capital stock, it is *held* that such a note is "property," and not included in the prohibition contained in § 138 of the Constitution, which prohibits any corporation from issuing stock except for money, labor done, or money or property actually received.

Stock — purchaser — corporation — going concern — liability.

2. The purchaser of stock in a corporation which has been duly organized and is a going concern is liable to the corporation for such part of the value of the stock so purchased as has not actually been paid in cash or its equivalent, and such indebtedness may be collected.

Promissory note — stock — exchange — subscription — check — promise — payment.

3. A promissory note given to a corporation in exchange for shares of its capital stock is, like a subscription or a check given for the same purpose, a promise to pay for such stock, and does not constitute payment therefor, nor relieve the stockholder, or the party entitled to stock, from his obligation to make actual payment as provided by § 4196, Rev. Codes of 1905.

Note or obligation — stockholder — payment — stock.

4. Section 4196, Rev. Codes of 1905, providing that no note or obligation given by a stockholder shall be considered as payment therefor, construed, and it is *held* that by the use of the words, "shall be considered," it is meant that when a note is given it shall not, in law, effect a payment.

Opinion filed June 6, 1913.

Note.—On the question of commercial paper as payment of subscription to stock, see note in 35 L.R.A.(N.S.) 80.

As to the payment of subscription to corporate stock with property, see notes in 42 L.R.A. 597 and 36 L. ed. U. S. 1111. And upon the effect of express provision by statute or charter for payment of subscription to stock in cash or money, to exclude payment in services or property, see note in 27 L.R.A.(N.S.) 315.

The question of the liability of stockholders for unpaid subscriptions is treated in a note in 3 Am. St. Rep. 806.

Appeal from an order of the District Court for Stark County, *Crawford,* J.

Affirmed.

Statement of Facts.

The plaintiff and respondent is a domestic corporation. It brought this action upon a promissory note given to it by defendant for $200, dated November 22, 1907, due November 22, 1908, with interest. The complaint is in the usual form. Appellant's answer admits the execution of the note, denies that it was given for a valuable consideration, and alleges that he made the note on the day of its date and delivered it, and in return therefor plaintiff delivered him 20 shares of its capital stock, and the form of the certificate is set out; that this was the only consideration for the note; that he was not a subscriber to the capital stock or to any stock of plaintiff corporation; that no part of said 20 shares were shares of stock owned or held by plaintiff from its surplus profits, or which had been purchased by it from its surplus profits, and no part thereof was held, issued, or sold by plaintiff by the unanimous consent of all its stockholders in writing, or had been forfeited or sold by plaintiff for nonpayment of assessments; that the transfer of such stock to defendant, in return for said promissory note, is prohibited by the Constitution and statutes, and was unlawful and void; that on the 5th of December, 1908, he learned that the transaction was void and unlawful, and immediately tendered back to plaintiff the certificate of stock described, and demanded of plaintiff the return of the note sued upon; that plaintiff refused to accept the said certificate or to return the note; that defendant did not pay, and plaintiff did not receive, any other, further, or different consideration for said certificate of stock than the note described, and he brings into court and tenders to plaintiff said certificate of stock.

The demand pleaded is in evidence, and states that defendant had, the day of making it, learned that plaintiff had no authority to issue the stock by reason of the provisions of § 4196, Rev. Codes of 1905, and accept a note in payment thereof; and he notifies plaintiff that he rescinds such contract, and tenders back such certificate, and demands the return of the note. To this answer plaintiff interposed a general

demurrer. The demurrer was sustained by the court, and this appeal is taken from the order sustaining it.

M. L. McBride (*L. A. Simpson,* of counsel) for appellant.

The promissory note given for stock, in this case, was issued as payment for such stock. Such transaction was void. Rev. Codes 1905, § 4196; § 4195, referred to in § 4196, has no application here.

There being no legal consideration, the stock was void. Void stock is not a valid consideration for a note. Easton Nat. Bank v. American Brick & Tile Co. 70 N. J. Eq. 732, 8 L.R.A.(N.S.) 271, 64 Atl. 917; Harvey-Watts Co. v. Worcester Umbrella Co. 193 Mass. 138, 78 N. E. 886; Mass. Rev. Laws, chap. 110, § 44.

The defendant gave prompt notice of rescission, and was not guilty of laches. American Tube Works v. Boston Mach. Co. 139 Mass. 5, 29 N. E. 63.

Heffron & Baird, for respondent.

The contract between plaintiff and defendant is a valid and legal one, with a lawful purpose, was fully executed, and cannot be rescinded by defendant. Illinois River R. Co. v. Zimmer, 20 Ill. 654; Goodrich v. Reynolds, 31 Ill. 490, 83 Am. Dec. 240; Allen v. Shelby R. Co. 16 B. Mon. 5; Little v. Obrien, 9 Mass. 423.

The note in question is a written *promise* to pay, merely. Thomp. Corp. § 1657.

There is no inhibition in the statutes. Secs. 4193–4197.

The written *promise* to pay created a debt,—an obligation. A note is not payment—in the absence of an express agreement. 6 Words and Phrases, 5250.

The note cannot be *considered* as *payment* for stock. Rev. Codes 1905, § 4197; State Const. § 138; Pacific Trust Co. v. Dorsey, 72 Cal. 55, 12 Pac. 49, 13 Pac. 148.

The note is *property,* and was given to obtain credit, in consummation of a lawful transaction. Mitchell v. Beckman, 64 Cal. 117, 28 Pac. 110; Hacker v. National Oil Ref. Co. 73 Pa. 97, 13 Mor. Min. Rep. 538.

This transaction stands the same as a subscription to stock. Erie & W. Pl. Road Co. v. Brown, 25 Pa. 156; Philadelphia & W. C. R. Co. v. Hickman, 28 Pa. 318.

The defense interposed is unconscionable. Vermont C. R. Co. v. Clayes, 21 Vt. 30; Illinois River R. Co. v. Zimmer, 20 Ill. 654; Goodrich v. Reynolds, 31 Ill. 490, 83 Am. Dec. 240; Pine River Bank v. Hodsdon, 46 N. H. 114; Selma & T. R. Co. v. Rountree, 7 Ala. 670; Greenville & C. R. Co. v. Woodsides, 5 Rich. L. 145, 55 Am. Dec. 708; Little v. Obrien, 9 Mass. 423; Leighty v. Susquehana & W. Turnp. Co. 14 Serg. & R. 434; Centre & K. Turnp. Road Co. v. M'Conaby, 16 Serg. & R. 140; Boyd v. Peach Bottom R. Co. 90 Pa. 169; Wagner v. Olson, 3 N. D. 69, 54 N. W. 286; 19 Cyc. 23–25 and 26, and cases cited in notes in these pages.

The legislature has provided penalties for doing certain acts, and no others can be substituted. Rev. Codes 1905, §§ 4194–4195; Wagner v. Olson, 3 N. D. 69, 54 N. D. 286; Boyce v. California Stage Co. 35 Cal. 475, 9 Am. Neg. Cas. 66.

The object of the law is to protect the stockholders and creditors. Pine River Bank v. Hodsdon, 46 N. H. 114; Harris v. Runnels, 12 How. 79, 13 L. ed. 901.

SPALDING, Ch. J. The transaction occurred between the parties on the 22d day of November, 1907; the note became due on November 22d, 1908, and rescission was not attempted until the 5th of December, 1908; that is, not until some days after the maturity of the note, and more than one year after the transaction took place. It will thus be seen that the question for decision is whether, under the statute prohibiting the taking of notes as payment for stock, the note is void and uncollectible. It appears that the certificate of stock was issued and delivered to the defendant. It, however, did not assume to be fully paid stock. This was not an original subscription of stock issued to form the corporation. The corporation had either determined to make a new issue of stock, or the whole amount of stock authorized by the charter had not been issued. It is immaterial which was the fact. It was an additional stock issue. What is the meaning of the prohibition contained in the statute? To determine this question we briefly consider the provisions of law relating to the formation of corporations and the issuance of stock. Section 138 of the Constitution prohibits any corporation from issuing stock or bonds except for money, labor done, or money or property actually received. Section 4195, Rev. Codes of

1905, is, in part, a legislative enactment of the quoted provisions of § 138 of the Constitution, with the words, "estimated at its true money value," inserted between "property" and "actually." A note is property, hence is not included in the constitutional prohibition. Section 4196 reads: "No note or obligation given by a stockholder, whether secured by pledge or otherwise, shall be considered as payment of any part of the capital stock; but the capital stock shall be paid in, either in cash, or in the manner provided in this article."

Other provisions of the statute provide for the issuance of stock before it is fully paid for, and contain provisions relating to its forfeiture for nonpayment, and for making assessments, and fixing the liability of officers who violate such provisions. These are not material, in the present controversy, except in that they show that the legislature did not contemplate that stock must be actually paid for in full before issuance or before one may become a stockholder. We do not consider it material whether the defendant, being the purchaser of additional stock, that is, stock issued by the corporation after it was a going concern, made his relation to the corporation any different from what it would have been had he been a subscriber to stock prior to its organization. The theory of the law regarding stockholders is that each one is the owner of such proportion of the corporate assets as his stock bears to the whole stock; that the stock, when paid for, furnishes a working capital for the corporation and a protection to its creditors, and that if not actually paid for in cash or its equivalent there is an indebtedness from the holder of the stock to the corporation; and that this indebtedness may be collected. The provisions for enforcing this liability, found in the Code, to which definite reference need not be made, are all evidence of this; in fact it is so clear that discussion is unnecessary.

Stock is made liable to assessment if not paid for. The assessment is made to provide the capital necessary to conduct the business, and for the benefit of creditors, as well as to put the stockholder who has not fully paid on an equality with those who have, if there are any such. When the stock is fully paid it absolves the stockholder as such from further liability, either to the corporation or to its creditors, except in certain instances which have no bearing in the case at bar. On an original subscription for stock, and the organization of the corporation, courts uniformly hold the subscription to be for the benefit of

the corporation, and that it can be enforced by it. The subscription is a promise to pay; it is not payment. The giving of a promissory note for stock is a promise to pay therefor. It is only a promise in a different form from the promise contained in a subscription. Neither the subscription, nor a check given for stock, nor a note, constitutes actual payment until it is in fact paid. We are of the opinion that the terms of the statute prohibiting any note being considered as payment for capital stock were intended to place notes on the same footing as subscriptions and as checks which are received subject to payment. It does not work payment, so as to relieve the stockholder, or the party entitled to stock, from his obligation to actually pay. Several authorities referred to hereafter hold that it postpones the date of payment as an accommodation to him. It is possible that it may postpone the payment of assessments if called, although we are disposed to think that it cannot be construed to do the latter, and it may obviate the necessity for an assessment on such stock.

The use of the words, "shall be considered," in the prohibition providing that no note shall be considered as payment, is significant. They mean that when a note is given it shall not, in law, effect a payment; that the purchaser of the stock is subject to the enforcement of the terms of the mandatory requirements of the statute, and it may mean that, in case of necessity, his obligation to pay is not postponed by the giving of the note beyond the point where he would have to pay in case no note had been given, but he had only made a contract of subscription, and the corporation had authority to deliver the stock to him on payment. We, however, do not decide whether, in such case, an assessment would lie before the maturity of the note.

It can hardly be questioned that, had he agreed to take stock and put the contract in writing, with nothing said as to the time of payment, and the corporation had neglected to demand payment, and the defendant had failed to make payment for a year, he would be liable. Had he given a check for his stock, and the check been dishonored, he would not be absolved. No more is he relieved from liability by the fact that he gave a note which shall not be considered as payment; that is, shall not be received as actual payment. He must be treated as though he had a contract for stock which he has not paid for. We think the authorities are practically uniform to this effect. Some au-

thorities appear, at first glance, to be to the contrary, but on analysis we think most, if not all, will be found to relate to cases in which there had been no power in the corporation, by reason of lack of authority or by reason of failure to do some mandatory act or acts necessary, to enable it to issue any stock of the kind in question. It is held, in cases where the corporation had authority and power to issue the stock, that, by recognizing the corporation as such and contracting with it for the stock, or accepting the stock, the mouth of the stockholder is closed to question the validity of the issue, and that he cannot rescind in the absence of fraud, etc., but that where there is an inherent lack of power in the corporation to make the issue of stock he is not estopped.

We make reference to a few authorities on the subject, some of which are directly in point and others involve principles so nearly identical as to be authority. It will be noticed that the authorities are not entirely uniform regarding some of the elements in the cases referred to, but as we read them they are unanimous so far as it relates to the principle here involved. Some of the authorities cited intimate that when the note is taken, by agreement of the parties, as payment, it will be considered as payment. So that there may be no misunderstanding on that subject, we may indicate that, under our statute, even though the note be taken under an agreement that it shall be payment, such agreement would doubtless be invalid. The parties are incompetent, under the statute, to make an agreement that the note shall be considered payment.

In Hacker v. National Oil Ref. Co. 73 Pa. 93, 13 Mor. Min. Rep. 538, the supreme court of that state passed upon a case on all fours with the case at bar. The statute provided that no note given by a stockholder shall be payment of any part of the capital stock. Suit was brought upon a note given for additional stock in the corporation, and the court held that the note given for stock was not given without consideration, and that notwithstanding the prohibitions of the statute it was valid. The court held that the corporation had authority to accept subscriptions for such additional stock, on such terms as to time and mode of payment as might, in the exercise of their sound discretion, be regarded for the best interests of the company, and that the defendant was bound to pay the note when it became due. See also Boyd v. Peach Bottom R. Co. 90 Pa. 169, and 4 Thomp. Corp. § 3940.

In Clark v. Farrington, 11 Wis. 321, it is held that there is a distinction between cases where a corporation is required to receive a specific sum at the time of subscription and those where a corporation makes a contract for the sale of its stock after it has once acquired legal existence and capacity to act; and the opinion says that some cases hold that subscriptions taken before the organization of the corporation, in violation of such provisions, would be invalid, but that they are not so in the latter case, for the reason that, in the former, parties taking the subscriptions are simply ministerial agents, clothed with no discretion or power to act, and can only pursue the strict letter of the statute, and that in such case it may well be urged that the intention was that such payment should be in cash; that until such payment there will be no corporation in existence. That court then says that it is very doubtful whether the cases relating to the first mentioned proposition are sustained by the weight of authority.

In Blunt v. Walker, 11 Wis. 349, 78 Am. Dec. 709, it is held that the giving and receiving a promissory note in payment for stock is not an extinguishment of the original contract, unless expressly so agreed, but that thereby the payment is only suspended for the time being. To the same effect, on this last point, see Williams v. Brewster, 117 Wis. 370, 93 N. W. 479, and authorities cited, to the effect that the subscriber does not pay for his shares by merely giving his written promise to pay, unless such be the agreement and intention of the parties, and that then the question would arise as to the power of the directors to make such an agreement.

Pine River Bank v. Hodsdon, 46 N. H. 114, is a strong case, in principle like the one at bar, and a large number of authorities are cited in the opinion. It is there held that notes given for stock required by the charter of the bank to be paid for in cash are collectible; that the bank, in claiming on the notes, acts for the benefit of all parties interested in the assets of the bank, including stockholders, both under original subscriptions and by subsequent purchase, bill holders, depositors, and other creditors, and represents the interests of all these classes; and that the directors, if concerned in such cheat and crime, did not make the bank representing the interests mentioned, and charged with such duties, a party to the cheat and crime in such a way as to prevent a recovery on the notes for the benefit of the parties

whom the valid law was intended to protect. And the court remarks that by holding otherwise the general objects of the provisions of the statute requiring stock to be paid for in cash would be, not advanced, but defeated.

The supreme court of California, in Pacific Trust Co. v. Dorsey, 72 Cal. 55, 12 Pac. 49, 13 Pac. 148, in passing upon a subscription for stock paid for by a promissory note executed to the corporation, and holding that such note is void as being against public policy, passed upon a section of the Constitution similar to our statute and Constitution, reading as follows: "No corporation shall issue stock or bonds except for money paid, labor done, or property actually received." And held that if it be conceded that the certificate in that case was improperly issued in exchange for the promissory note of the subscriber before the actual payment of the money or some part of it, that that fact would not render void the subscriber's promise to pay at a subsequent time, and so release him from all liability.

In Vermont C. R. Co. v. Clayes, 21 Vt. 30, the supreme court of that state had under consideration a statute incorporating the Vermont C. R. Co. wherein it was enacted that every person at the time of subscribing shall pay to the commissioners $5 on each share for which he shall subscribe, and each subscriber shall be a member of said company. The defendant subscribed for 50 shares, but instead of paying the commissioners in money, $5 for each share, at the time of subscribing, he gave them his promissory note for that amount. The note was payable to the commissioners and turned over to the corporation upon its organization. It was held that the note was given upon sufficient consideration and was a valid note in the hands of the corporation; that the fact that a note was given could not have the effect to give the defendant the right to repudiate his contract or render it void for want of consideration; and that the corporation, having accepted the note, could not deny to the defendant the rights and privileges of a corporator. It is true, in that case, the note was treated as though it were payment, but certainly if it was not void as payment a note cannot be void, under our statute, when not received as payment. To the same effect, see Selma & T. R. Co. v. Rountree, 7 Ala. 670.

In Little v. Obrien, 9 Mass. 423, the Massachusetts court held that an individual stockholder who had given his notes to a corporation in

payment for stock when the law required its stock to be invested in certain specified funds, excluding the notes of stockholders, could not avail himself of the misconduct of the company to avoid the payment of his note so given; and that it was given on a sufficient consideration.

In Goodrich v. Reynolds, 31 Ill. 490, 83 Am. Dec. 240, it was held that where the charter of a railroad company required each subscriber to pay 10 per cent at the time of his subscription, and where the subscriber was allowed to give a note for the gross amount of the calls which his stock was liable to, it was an indulgence to the subscriber to thus extend the time of payment to him, of which he could not complain, however much other paying subscribers might complain; that this indulgence was a most ungracious defense which should not be allowed unless strictly required by some inflexible rule of law. To the same effect, see Illinois River R. Co. v. Zimmer, 20 Ill. 654.

It is held in Wight v. Shelby R. Co. 16 B. Mon. 4, 63 Am. Dec. 522, that where it was the duty of the subscriber for capital stock to pay at the time the subscription was made, that he could not exonerate himself from liability because he had been allowed to take advantage of his own wrong by not paying at that time.

The rule announced in Cyc. is that the acceptance of a certificate of stock issued to the person who accepts it implies a promise that he will pay for the shares, and that thereby the party stands liable to pay assessments, although he has not yet made any express promise so to do. 10 Cyc. 381. It was held in Harvey-Watts Co. v. Worcester Umbrella Co. 193 Mass. 138, 78 N. E. 886, that the giving of a note for stock is not payment therefor.

In American Tube Works v. Boston Mach. Co. 139 Mass. 11, 29 N. E. 63, the distinction between cases where a rescission may be made by the stockholder and one where he may not rescind is shown, and it is held that he is not bound by any estoppel, and can rescind, and has a right to be restored to his original position when the issuance of the shares is originally illegal so that the company had no power to issue shares at all, but that where there has been a legal creation of the capital stock of the corporation, he may be a shareholder by estoppel. In that case the corporation had issued stock which was, at the time, supposed by both parties to be valid, but which was invalid because the preliminary steps necessary to a valid issue of the class of stock of which that

in suit formed a part had not been taken. The corporation had no right to make an issue of stock. This case is not an authority for the defendant, but is rather an authority against him. See 10 Cyc. 373.

Reviewing the situation, we may add that it would be highly inequitable and unjust, under the circumstances of this case, to permit the defendant to escape the payment of his obligation. It is not disclosed by the pleadings what he has done during the year in which he has been a stockholder in the plaintiff corporation. Whatever the facts may be, he had the opportunity to act as a stockholder during all that time, to vote his stock, to participate as a stockholder in the management of the affairs of the corporation, to receive the benefits to be derived as a stockholder; the corporation had the opportunity to hold him out to the world as a stockholder. He could inspect its books, and familiarize himself with its business transactions; and after having derived all these benefits, or having had the opportunity to do so, it would be unjust to permit him to escape the liability which he voluntarily assumed, even though he assumed it, as he contends, in ignorance of the law governing the purchase and sale of corporate stocks. He was just as much charged with knowledge of the law on the subject as were the officers and directors of the corporation. Authorities are in conflict as to the presumption in case a note is taken; some holding that the presumption is that it was taken in payment of an obligation, and others that it is taken subject to payment, and is not payment unless in fact paid. The language of § 4196, to which reference has been made, seems to us clearly to be intended simply to settle this question as to notes given for capital stock in a corporation, and such language was doubtless used in view of such conflict of authorities, and to settle the question in this jurisdiction on this subject.

The order of the District Court sustaining the demurrer to the answer interposed by the defendant is affirmed.

INVESTORS' SYNDICATE, a Corporation, v. THOMAS H. PUGH, as Administrator of the Estate of Jeremiah S. Letts, Deceased, and Arthur B. Robinson, as Administrator of the Estate of Elizabeth W. Letts, Deceased, and John W. Beyer, as Intervener.

(142 N. W. 919.)

Disbursements — transcript on appeal — statutory costs.

1. An allowance for disbursements in making a transcript on an appeal to the supreme court is allowed under § 7177, Rev. Codes 1905, as taxable disbursements, and is held not to be covered by § 7174, Rev. Codes 1905, which relates to statutory costs, and not to disbursements.

Suit — equity — stenographer — testimony — costs.

2. Where a trial judge in a suit in equity appoints a stenographer to take and report testimony, it is proper to allow to such person the fees allowed by § 2608, Rev. Codes 1905, and to tax the same as costs and disbursements in the proceeding.

Surety company bonds — appeal — taxable costs — amount.

3. Although the giving of surety company bonds upon appeal is authorized by §§ 4456 and 4457, Rev. Codes 1905, and the cost thereof may, under such statutes, be included in the taxable costs and disbursements in the proceeding, the amount taxed cannot exceed 1 per cent of the penalty or liability, no matter how much actually was paid or was necessary to be paid for such bonds.

Statutes — bonds on appeal — constitutionality.

4. Sections 4456 and 4457, Rev. Codes 1905, which authorize the giving of such bonds and the taxing of the cost thereof, are not unconstitutional as being class legislation.

Printing — brief and abstract — appeal — costs.

5. A claim for printing briefs and abstract held to be reasonable under the circumstances, and allowed.

Foreclosure — attorneys' fee — statutory costs — mortgagor — mortgagee — intervener.

6. Although in a foreclosure proceeding the foreclosure attorneys' fees provided by § 7176, Rev. Codes, exclude the taxable statutory costs provided for in § 7174, Rev. Codes 1905, as between the mortgagee and the mortgagor, yet such costs can properly be recovered against, and are the only attorneys' fees recover-

able against, an intervener who does not defend against the foreclosure, but claims title to the mortgage and seeks to have the same assigned and set over to him.

Opinion filed June 6, 1913.

Appeal from the District Court for Stark County; *Crawford*, J.

Motion to review retaxation of costs. Defendant and intervener appeal.

Modified.

Statement by BRUCE, J.

This is an appeal from an order of the district court of the tenth judicial district, sustaining a retaxation of costs by the clerk of that court under § 7186, Rev. Codes 1905. The bill of costs, as retaxed, was:

Costs in District Court.	
Sheriff's fees	
Clerk's fees	$7.00
Making transcript (including exhibits and binding)	125.50
Stenographer's fees, taking testimony	55.30
Bonds on appeal	40.00
Clerk's fees, certifying record on appeal	5.00
Statutory—	
Before notice of trial	10.00
After notice of trial	3.00
Additional defendants—(4)	4.00
Attorney fees on foreclosure	50.00
Remittitur	2.00
Costs in Supreme Court.	
Making and serving statement of case, etc.	7.00
Before argument	5.00
Argument	15.00
Clerk's fees	15.65
Printing abstract and briefs	534.54
	$878.99

The appellant objects to the allowance of the following items:

(a) Making transcript, including exhibits and binding	$125.50
(b) Stenographer's fee, taking testimony	55.30
(c) Bonds on appeal	40.00
(d) Items of statutory costs, to wit, $10, $3, $4	17.00
(e) Items of printing appeal	534.50
	$772.30

The merits of the controversy were passed upon by this court in the case of Investors' Syndicate v. Letts, 22 N. D. 452, 134 N. W. 317. The action was one to foreclose a mortgage, to which a defense was interposed of the statute of limitations and of a general want of equity. A petition in intervention was also filed, which alleged that the mortgage had been obtained by the plaintiff by fraud, and that the plaintiff had no right thereto or to foreclose the same, and which prayed that the said mortgage be decreed to belong to the intervener. To this petition an answer was filed, which denied its allegations generally, and also contained a plea of *res judicata.* In the district court the issues were decided in favor of the intervener, but an appeal being taken to this court and upon a trial *de novo* had under the provisions of § 7229, Rev. Codes 1905, the judgment of the district court was reversed and a judgment ordered in favor of the plaintiff and against the defendants and intervener for a foreclosure of the mortgage. The opinion of the supreme court was largely based upon a determination in favor of plaintiff's plea of *res judicata,* which it had interposed to the complaint in intervention, and which the lower court had decided adversely to it.

M. A. Hildreth, for appellants.

The law does not allow the expense of *making a transcript,* as either costs or disbursements. Rev. Codes 1905, §§ 7173, 7174; Elfring v. New Birdsall Co. 17 S. D. 350, 96 N. W. 703.

There is no authority for allowing the expense of a surety bond on appeal, as costs or disbursements. Ellis v. Wait, 4 S. D. 504, 57 N.

W. 232; Novotny v. Danforth, 9 S. D. 412, 69 N. W. 585; 5 Enc. Pl. & Pr. 110; Bick v. Reese, 52 Hun, 125, 5 N. Y. Supp. 121.

The amount involved on the appeal was less than $300, and plaintiff printed his abstract and brief at his own risk. Code Civ. Proc. 1905, § 7230; Ingwaldson v. Skrivseth, 8 N. D. 544, 80 N. W. 475; Black v. Minneapolis & N. Elevator Co. 8 N. D. 96, 76 N. W. 984; Casseday v. Robertson, 19 N. D. 574, 125 N. W. 1045; Engholm v. Ekrem, 18 N. D. 185, 119 N. W. 35; Whitney v. Akin, 19 N. D. 638, 125 N. W. 471; Wold v. South Dakota C. R. Co. 23 S. D. 521, 122 N. W. 583; Buehler v. Staudenmayer, 146 Wis. 25, 130 N. W. 955, 131 N. W. 986.

Bangs, Cooley, & Hamilton, for respondent.

The North Dakota cases cited by counsel were decided under § 5631 of the Code of 1895. That section was amended, and is now § 7230, Rev. Codes of 1905. Under the provisions of § 7178, Rev. Codes, the word "may," as used in § 7173, means "must."

BRUCE, J. (after stating the facts as above). Appellants' first objection is to the allowance of the item of $125.50 "for making transcript, including exhibits and binding." Their first contention is that these costs or disbursements are provided for in ¶ 3 of § 7174, Rev. Codes 1905, where an allowance of "$5 for a statement of the case and $2 more where it exceeds 50 folios," is provided for. In this they are clearly in error. Paragraph 3 of § 7174 relates to what are commonly called and known as "statutory costs," and not to disbursements, and has no application to the charge before us. This is provided for in § 7177, Rev. Codes 1905, which provides that "in all actions and special proceedings the clerk must tax as a part of the judgment in favor of the prevailing party his necessary disbursements, as follows: The legal fees of witnesses and of referees and other officers, the necessary expenses of taking depositions and of procuring evidence necessarily used or obtained for use on the trial, the legal fees for publication when publication is made pursuant to law, and the legal fees of the court stenographer for a transcript of the testimony when such transcript is used on motion for a new trial or in preparing a statement of the case." Counsel lays emphasis upon the words, "for making transcript, including exhibits and binding," used in the bill of costs

and disbursements, and states that "it is not a transcript or stenographer's minutes, but it is for *making a transcript,* including exhibits and binding," but we can see no merit in the contention. The affidavits filed in the case clearly show that the amount claimed was actually paid out, and we have no doubt that it was reasonably necessary. We also have no doubt that such disbursements were contemplated by § 7177, Rev. Codes 1905.

Appellants' next objection is to the allowance of $55.30 for stenographer's fees for taking testimony. He says: "As appears from the face of the record, this case was an equity case. It was tried before the court, who ordered the evidence to be taken by the stenographer of the tenth judicial district. There was no justification for charging up the fees of an official who was a court stenographer and who under the law was doing that which the judge was required to do, take the testimony, and therefore that item was improperly included in the bill of costs." We can, however, hardly see the force or the logic of this objection. We are not here called upon to decide whether the case was one in which a referee could or should have been appointed by the court, for the parties expressly stipulated that such an appointment could be made. We find in the record, indeed, no objection to the reference, but, on the other hand, in the statement of the case the following statement: "In accordance with the stipulation hereto attached, entered into and between the parties at Dickinson, Stark county, North Dakota, agreeing that Mr. Geo. Schneupper, court reporter of the sixth judicial district, North Dakota, shall take and *report* the testimony in the above-entitled case, hearing was had on the 18th and 19th day of March, 1907, at Dickinson, North Dakota, and the testimony was taken by the said Geo. Schneupper at that time." We also find the following: "This case having been in the first instance referred to a referee to take testimony and report, and a portion of the said testimony having been taken before the said referee, and a portion before a notary public in Minneapolis, it is now agreed between all parties in open court that the evidence is before the court with the same force and effect as though originally introduced before the judge of this court in open court." The first stipulation is not copied into the abstract, though the second one is, but that both stipulations were made appears in the original abstract, and is beyond dispute.

From them it appears that the stenographers, both at Dickinson and Minneapolis, were not merely to take but to report testimony; in other words, they were referees as well as stenographers. The abstract also shows that two days were consumed in taking the testimony at Dickinson before the court stenographer, Geo. Schneupper, and four days in taking testimony at Minneapolis before the stenographer there, Miss Smith. The testimony taken at Minneapolis consisted of some nine hundred folios. The trial judge allowed $17.80 for taking and reporting the testimony at Dickinson, and $37.50 to Miss Smith for taking and reporting the testimony taken at Minneapolis. It will be seen that the above allowance did not equal the $10 per diem, which may be allowed to a referee for his services merely as a referee. It also came clearly within the 1 cent for every ten words allowed by § 2608, Rev. Codes 1905, for taking testimony. Under the stipulation, the stenographers acted both as stenographers and as referees to report testimony. Section 2608, Rev. Codes 1905, provides that referees shall be entitled to charge the following fees: (1) For copying any papers or instruments or taking testimony, for every ten words 1 cent; (2) swearing the witnesses, 10 cents; (3) making report of facts or conclusions of law or upon exceptions, for every ten words, 1 cent; (4) and such additional fees as the court shall allow, not exceeding in any one case the sum of $10 per day, except by agreement of the parties.

We are unable to see that the trial court in any way abused his discretion in the allowance that he made in this case.

When we come to the allowance of $40 for appeal bonds, we are not quite so well satisfied. The giving of surety company bonds, and the taxation of not more than 1 per cent per year on the amount of the penalty or *liability* as disbursements on appeals, seem to be fully authorized by §§ 4456, 4457, Rev. Codes 1905. In the bonds in question, however, we are not informed as to penalty, and the statute, in the absence of such definite penalty, merely provides for 1 per cent of the liability. The liability in one case could hardly have been beyond $660, while in the other it could hardly have been beyond $360. It may probably have been that a surety company would not split hairs in such matters, and would decline to issue less than a $1,000 bond; but the statute seems plain upon the point that

it is the liability alone which will control where no penalty is actually agreed upon. The allowance, therefore, should have been $20.40, and not $40. We are fully satisfied, however, that this allowance of $20.40 should be made. Counsel for appellant, we know, contends that the bonds were cost bonds merely, that their obligation was only $250. In this, however, he is in error. That the bonds were supersedeas bonds as well as cost bonds is plain from a perusal thereof. The obligations of the bonds were as follows: "Now therefore, we, the undersigned, Investors' Syndicate, as principal, and Fidelity & Deposit Company of Maryland, as surety, do jointly and severally undertake, promise, and agree to, and with the above-named John F. Beyer, that the said Investors' Syndicate will, if the said judgment appealed from or any part thereof is affirmed, pay the amount directed to be paid by said judgment, or the part of said judgment as to which said judgment is affirmed, if it is affirmed only in part, and all damages awarded against the said appellant on said appeal; and we further undertake and agree that the said appellant will pay all costs and damages that may be awarded against it on said appeal not exceeding the sum of $250.00."

Counsel also contends that §§ 4456, 4457, are unconstitutional in so far as they permit an allowance for the cost of surety company bonds, and contends that since no allowance is made by the statute for the payment of the cost of bonds when given by private individuals, the clauses referred to are void as class legislation. We do not, however, so hold. Our Constitutions, state and Federal, nowhere in terms use the words, "class legislation." They merely provide that "no special privileges or immunities shall ever be granted which may not be altered, revoked, or repealed by the legislative assembly; nor shall any citizen or class of citizens be granted privileges or immunities which upon the same terms shall not be granted to all citizens." N. D. Const. art. 1, § 20. All that the 14th Amendment to the Federal Constitution provides is that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." "Class legislation" is not synonymous with "classification," says the Supreme Court of the United States in the case of Chicago, B. & Q. R. Co. v. Iowa (Chicago,

B. & Q. R. Co. v. Cutts) 94 U. S. 155, 24 L. ed. 94, "is not necessarily discrimination, and a reasonable discretion in such matters has generally been conceded by the courts." See also McAunich v. Mississippi & M. R. Co. 20 Iowa, 342; Kniseley v. Cotterel, 196 Pa. 614, 50 L.R.A. 86, 46 Atl. 861. "A law is general, not because it embraces all of the governed, but when many are embraced in its provisions and all others may be, when they occupy the position of those who are embraced." Hawthorn v. People, 109 Ill. 302, 50 Am. Rep. 610. We have yet to find that there is in North Dakota a personal bonding industry; that is to say, any body of men who, as individuals, are engaged, or wish to be engaged, in the industry of giving bonds for compensation. When such a class arises it may be well to consider the question of class legislation in relation to statutes of the kind before us, and it would seem that the protest should come from the members of that class. See also opinion in Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; Vermont Loan & T. Co. v. Whithed, 2 N. D. 82, 94 N. W. 318; Edmonds v. Herbrandson, 2 N. D. 270, 14 L.R.A. 725, 50 N. W. 970.

After all, the intention of the legislature seems to have been to see that satisfactory bonds should and could be furnished in the numerous cases where the giving of bonds are required by our statutes. We have no law making a bond a lien upon real property, and the unsatisfactory nature of personal bonds has been universally recognized. The owner of real property to-day may be without any to-morrow; especially is this true in the migratory West. So, too, the legislature may well have taken cognizance of the fact that it is often difficult to get such personal bonds. It may have, therefore, and no doubt did, recognize the need of some agency that might meet the contingency, and have desired not only to make the surety company bond a valid obligation, but one that could be readily and easily obtained. The day, we believe, has gone by when the courts should explore the upper ether in order to discover imaginary discriminations. We do not believe that the sections in question can be attacked upon this ground.

As far as the allowance of $534.50 for printing briefs and abstracts on appeal is concerned, we think the appellant in this case has no grounds for complaint. We are of the opinion that there was altogether too much testimony taken in the case, and that the costs are

absurdly disproportionate to the amounts involved. We cannot see, however, how the respondent can be blamed therefor, or that it could very well have escaped incurring the expense. On an examination of the abstract, indeed, we find that of the 1052 pages 800 are devoted to a reproduction of the pleadings, direct testimony, and cross-examination, and exhibits of the appellants herein. The appellants in this retaxation appeal obtained the judgment in the court below in the principal action from which the appeal was taken. The lower court in the original proceedings disallowed the plea of *res judicata,* and the case was tried upon its merits. It was appealed to this court on a trial *de novo* also on its merits. If any of these pleadings, testimony, and exhibits had been omitted by appellant in the original appeal, we have every reason to believe that the appellant in the retaxation matter before us would have strenuously objected and filed an additional abstract. At any rate, it would generally seem that an appellant has a right to believe that the other party considers his own testimony competent and necessary. It is worthy of notice, indeed, that prior to the hearing of the original appeal, counsel moved for a dismissal of the appeal, because a voluminous book exhibit had not been incorporated in the record. It is true that this court decided the case on the original appeal on the plea of *res judicata;* but as we have said, the trial court did not, and all of the issues in the proceedings were therefore raised *de novo* upon the appeal. The cost of printing appellants' pleadings, testimony, and exhibits alone would, if the legal rate had been charged, have amounted to $800. We do not believe that the charge of $534.55 for the whole of the abstract and briefs was unreasonable. The case is but one of many where, under the license permitted by the so-called Newman law, counsel in the heat of the conflict wander far and wide in the introduction of their testimony, regardless of its competency and relevancy or of the strict rules of evidence. As long as the Newman law remains upon the statute books, and the trial courts are shorn of their power to rule out incompetent and irrelevant evidence, we see no escape from bills of costs and disbursements such as those before us, unless indeed counsel themselves will limit their examination of witnesses within the bounds that the rules of strict practice prescribe.

Nor can we see that the trial court abused his discretion in allowing

the statutory costs of $10, and $3, in this case, and provided for by § 7174, Rev. Codes 1905. We realize that the mortgage provided for an attorney's fee of $50, and that that fee was also retaxed. The petition in intervention, however, was not a defense as against the mortgage, and was not filed on behalf of the mortgagor or his privies. It was filed by an outsider, who claimed that the mortgage had been assigned to him and was his. The costs incurred in resisting the petition in intervention, therefore, were not incurred in the process of foreclosure, but merely in litigating a contest between the intervener and the mortgagee as to the right and title to the mortgage. We, however, see no reason for allowing the fee of $4 for additional defendants, as the intervener was not concerned with them. As against the mortgagor the plaintiff is entitled to tax the sum of $50 (attorneys' fees) only, as against the intervener the statutory costs of $13 only.

The judgment of the District Court is reduced by the sum of $23.60, and in all other respects affirmed.

No costs or disbursements will be allowed to any of the parties upon this appeal.

On Application for a Rehearing, Filed Sept. 2, 1913.

BRUCE, J. The petition for a rehearing does not change our views in this case and the same is denied. We, however, wish to suggest as another justification for the allowance of the $46.75 for "copying exhibits used on appeal to the supreme court," and paid to the clerk of the district court, the portion of § 7177, Rev. Codes 1905, which, among other things, provides that the clerk may tax "the legal fees of witnesses and of referees and of *other officers;*" paragraph 11 of section 2584, Rev. Codes 1905, which provides that the clerk may charge "for making certified abstracts of any judgment or certified copy of any judgment, order, or other papers filed or recorded in his office, for the first four folios fifty cents; for each additional folio, ten cents;" and Supreme Court Rule No. 15, 10 N. D. XLVII, 91 N. W. IX, which provides among other things, that "Documents on file in the case and original exhibits, offered in evidence, or properly certified or authenticated copies of such documents and exhibits, shall be attached, and must be made a part of the statement of the case."

CLAUDE SMITH BAILEY v. KARL S. HENDRICKSON.

(143 N. W. 134.)

Mortgagee — attorneys for — foreclosure by advertisement — written bid — sheriff — authority.

1. A direction in writing, by the attorneys for a mortgagee to the sheriff, to bid a specified amount for the premises on a foreclosure by advertisement, construed and *held*, to be, in legal effect, a written bid for the amount stated, authorizing the sheriff to strike it off to the mortgagee if no one bid a greater sum.

Foreclosure sale — amount bid — inadequacy — sale — fraud — undue advantage — prejudice.

2. Mere inadequacy of price at a foreclosure sale is not a ground on which to set aside a foreclosure, in the absence of fraud, undue advantage, or prejudice. Grove v. Great Northern Loan Co. 17 N. D. 352.

Mortgagee — foreclosure — second mortgage — bidder — amount — adequacy — security.

3. Where the mortgagee, at a sale under a foreclosure of a second mortgage by advertisement, bids the amount due upon his mortgage, with costs of foreclosure, and is the highest bidder, the amount so bid cannot be held an inadequate price under the circumstances; and the adequacy or inadequacy of the price is not measured by exactly the same considerations that would determine the question were it at a public auction for other purposes, as it cannot be assumed that the law contemplates that a mortgagee, to protect his debt and security, must advance, under such circumstances, an amount perhaps several times the debt, for the protection of the small sum secured. To hold that he must do so would, in many cases, impose a burden upon him which would render his security valueless.

Foreclosure by advertisement — notice — bidders — opportunity — public — — legal sale.

4. The presence and participation of more than one bidder at a foreclosure sale by advertisement, when proper and legal notice has been given thereof, is not necessary to a legal sale. It is sufficient if the public has been fully advised of the sale by legal publication of notice, and has the right and opportunity to attend and bid.

Newspaper — qualifications — legal notices — circulation — advertisement.

5. Section 2279, Rev. Codes of 1905, prescribes the qualifications that a newspaper must possess to entitle it to publish legal notices, and it is not for the court, in the absence of fraud, to overturn the legislative judgment on the subject and set aside a foreclosure sale, where the advertisement was published in a

newspaper qualified under said section, because it may not have had as great a circulation in the vicinity of the land as some other paper published in the county.

Mortgagor — foreclosure — publication of notice — knowledge — actual — fraud — bad faith — process — personal service.

6. The mortgagor, on foreclosure of a mortgage by advertisement under a power of sale, the advertisement being published in a newspaper published in the county in which the land is situated, and qualified under the provisions of § 2279, Rev. Codes of 1905, to publish legal notices, is charged with knowledge of the foreclosure proceedings; and the fact that he has no actual knowledge thereof is not, under ordinary circumstances, evidence of fraud or bad faith; and the notice so published has the same binding force that a foreclosure by action has when the defendants therein are personally served with process. Grove v. Great Northern Loan Co. supra.

Mortgage — power of sale — number of publications — sufficiency.

7. Six publications in six successive weeks, the last publication being the day before the sale, in a foreclosure under power of sale contained in the mortgage, fills the requirements of § 7459, Rev. Codes of 1905, which requires that notice be given by publication six times, once in each week for six successive weeks.

Foreclosure — interest payment — first mortgage — mortgagor — knowledge — redemption — taxes.

8. The fact that the mortgagor paid interest on a first mortgage after the institution of foreclosure proceedings under a second mortgage, and that the mortgagee so foreclosing did not ascertain that fact and prevent his doing so; and the further fact that the mortgagor paid taxes on the premises after commencement of foreclosure proceedings,—is not a reason for vacating the sale, and particularly when it is not shown that the mortgagee had knowledge of these facts, and when, if known, he had a right to assume that the mortgagor, who had full knowledge of the second mortgage, was intending to pay or redeem from it.

Mortgagee — redemption — rent — bad faith — fraud.

9. In the absence of proof that the mortgagee knew that the mortgaged premises were cultivated or rented during the year of redemption, the fact that he did not collect the rent due from the tenant during such period, and that the same was paid by the tenant to the mortgagor and retained by him, is not evidence of bad faith or fraud on the part of the mortgagee, in the conduct of his foreclosure proceedings.

Mortgage — assignment — record — foreclosure — mortgagor — payment of debt.

10. The fact that the party who owned and foreclosed a mortgage held it under an assignment which he did not place of record until some months after

taking it, but did record it some time prior to the commencement of foreclosure proceedings under the power of sale, in the absence of other circumstances, does not show fraud or lack of good faith on his part, particularly when it appears that the mortgagor never attempted to pay the debt, and proceeded in total disregard of the mortgage, and was in no manner prejudiced by the failure to record the assignment.

Mortgage — foreclosure — premises — distinct tract — sale — bidders.

11. Where mortgaged premises consist of a quarter section constituting one distinct farm or tract, it is not necessary to a valid foreclosure sale under a power that less than the whole tract be sold, particularly where it was first offered in tracts of 40 acres each, then in tracts of 80 acres each, without bidders.

Notice of foreclosure — name of holder — sheriff — attorney — disclosures of notice — valid.

12. Failure to append the name of the holder of the mortgage to a notice of foreclosure under a power, when it is signed by the sheriff and by an attorney as attorney for the assignee, and the notice discloses the name of the assignee foreclosing, does not render the sale invalid.

Foreclosure — proceedings — regular — mortgagor — knowledge of — concealment — intent.

13. Where all the proceedings in a foreclosure under a power of sale contained in the mortgage are regular and in full compliance with law, the fact that some of the acts might have been done as they were done for the purpose of preventing the mortgagor from acquiring knowledge of the foreclosure proceedings is not evidence of bad faith on the part of the mortgagee, in the absence of any showing of an intent to conceal the foreclosure, or of knowledge by the mortgagee that the mortgagor did not have actual knowledge of the proceedings.

Opinion filed June 11, 1913.

Appeal from a judgment of the District Court for Bottineau County, *Leighton*, J.

Reversed.

Statement of Facts.

This is an action brought January 20, 1910, to vacate a foreclosure sale by advertisement of a second mortgage given by Claude Smith Bailey, the plaintiff herein, upon the N. E. quarter of section 19, in township 163 N., range 83 W., in Bottineau county, and to be allowed

to pay such mortgage. It is here for trial *de novo*. We find the facts to be:

(1) That on the 21st day of August, 1905, the plaintiff was the owner in fee of said premises, and that on that date he executed a second mortgage to one R. H. Grace thereon to secure the payment of the sum of $54, evidenced by promissory notes, the last of which became due November 1, 1906;

(2) That such mortgage was recorded in the office of the register of deeds of Bottineau county on the 28th day of August, 1905;

(3) That on the 13th day of September, 1906, said Grace assigned the said mortgage, with the notes secured thereby, to the Mohall State Bank, and that such assignment was recorded in the office of the register of deeds of Bottineau county, on the 30th day of November, 1906;

(4) That said Mohall State Bank, on the 30th of November, 1906, assigned said mortgage to the defendant, Karl S. Hendrickson, together with the notes secured thereby, and that the assignment thereof was recorded in the office of the register of deeds of Bottineau county on the 6th day of March, 1908;

(5) That on the 18th day of March, 1908, a foreclosure proceeding by advertisement was instituted on said mortgage. The body of the notice of sale recited the giving of the mortgage and the two assignments mentioned, and their recording as hereinbefore stated, together with the dates, the hour, and books and pages of record;

(6) That such notice of foreclosure sale was not signed by said Hendrickson, but was signed only by the sheriff of Bottineau county and "Bosard & Ryerson, attorneys for assignee, Mohall, N. D.;" and that the publication of such notice was made in the Lansford Times, a newspaper published at Lansford, Bottineau county, conforming to the requirements of § 2279, Rev. Codes of 1905, and entitled to publish legal notices, for six consecutive weeks, in the issues of March 20 and 27, 1908, April 3, 10, 17, and 24, 1908; and the sale was made on the date advertised, namely April 25, 1908, and at the proper place; that the firm of Bosard & Ryerson was located at Mohall, in the eastern part of Renville county, on the same line of railway on which Lansford is located; that both Lansford and Mohall are approximately 50 miles from Bottineau, the county seat;

(7) That on the 20th day of April, 1908, said firm of Bosard & Ryerson wrote the sheriff of Bottineau county, informing him that the sale was set for Saturday, the 25th day of April, that they had written the Lansford Times to forward him the affidavit of publication and bill for printing, and authorizing him to bid the property in for the amount due;

(8) That the publication was made in the Lansford Times, for the reason that it was only a few miles from Mohall and on a direct mail line therefrom; and that it was a matter of convenience to said firm of attorneys to have their legal notices published in the Lansford Times, and that they had practically all their legal notices published therein as a matter of convenience and to save delay, and for no other reason. It does not appear that the defendant himself knew in what paper publication was made, or the date of sale.

(9) That the sheriff first offered the land for sale in tracts of 40 acres each; that he received no bids therefor; that he then offered the same in legal subdivisions of 80 acres each, but received no bids therefor; that thereupon he offered it in one tract or parcel, and struck off and sold it to the defendant, Hendrickson, for the sum of $113.32; and that said Hendrickson was the highest bidder therefor, and that the price mentioned was the highest price bid; that the whole price so bid was paid by said purchaser;

(10) That the certificate of sale was recorded in the office of the register of deeds of Bottineau county, on the 2d day of May, 1908; that on the 27th day of April, 1909, a sheriff's deed on foreclosure by advertisement was executed and delivered by the sheriff of Bottineau county to said Hendrickson, and on the same day recorded in the office of the register of deeds of that county;

(11) That Bailey, the mortgagor, had no actual knowledge of the pendency of said foreclosure proceedings, or of the execution of the deed thereunder, until after the expiration of the period of redemption and the delivery of such deed to the defendant; that he made no attempt to ascertain the amount due on the mortgage, or to pay the same from the time it became due, in 1906, until after the execution and delivery of the sheriff's deed; that during such time he was in Indiana and in the state of Washington, and other places, and that he changed his residence or location without leaving instructions where to forward his

mail; but that from the month of April, 1908, to the fall of that year he was upon the premises in question;

(12) That the plaintiff, Bailey, leased said premises for the season of 1908, and received as rental therefor the sum of $240, and that the defendant, Hendrickson, never made any claim to the rents during the year of redemption or at any other time, and that it does not appear that he knew of the premises being rented or cultivated;

(13) That the Lansford Times was published 22 miles from the land in controversy, and that another legal newspaper was published at Antler, a distance of about 9 miles from such land.

Bosard & Twiford, for appellant.

The evidence with reference to the plaintiff's knowledge of the ownership of the mortgage was wholly irrelevant and immaterial. So, also, in regard to the value of the land. Grove v. Great Northern Loan Co. 17 N. D. 352, 138 Am. St. Rep. 707, 116 N. W. 345.

The sheriff's certificate of sale, shall be taken and deemed evidence of the facts therein recited. Rev. Codes, 1905 § 7137; Rev. Codes, 1905, § 7464.

The party foreclosing a mortgage need not sign his name to the notice. It is sufficient that it appears in the body of the notice. Michigan State Ins. Co. v. Soule, 51 Mich. 312, 16 N. W. 662; Babcock v. Wells, 25 R. I. 23, 105 Am. St. Rep. 848, 54 Atl. 596; Menard v. Crowe, 20 Minn. 448, Gil. 402; Fitzpatrick v. Fitzpatrick, 6 R. I. 64, 75 Am. Dec. 681, note 711; Woonsocket Inst. for Sav. v. American Worsted Co. 13 R. I. 255, 27 Cyc. 1470; Gibbs v. Cunningham, 1 Md. Ch. 44; Freeman, Executions, § 285; Perkins v. Spaulding, 2 Mich. 157; Harrison v. Cachelin, 35 Mo. 79; Wallis v. Thomas, 6 La. Ann. 76; Coxe v. Halsted, 2 N. J. Eq. 311; Hoffman v. Anthony, 6 R. I. 282, 75 Am. Dec. 701; McCardia v. Billings, 10 N. D. 373, 88 Am. St. Rep. 729, 87 N. W. 1008.

The statute does not require the notice to be signed by anyone. Rev. Codes, 1905, § 7460.

The sheriff must make the sale. Rev. Codes, 1905, § 7461.

All the law requires is that the advertisement must conform to statutory requirements. Reading v. Waterman, 146 Mich. 107, 8 N. W. 691; Rev. Codes, 1905, § 7460; Stephenson v. January, 49 Mo. 465.

The notice must not be misleading, or calculated to mislead. Iowa Invest. Co. v. Shepard, 8 S. D. 332, 66 N. W. 451; McCardia v. Billings, 10 N. D. 373, 88 Am. St. Rep. 729, 87 N. W. 1008; Judd v. O'Brien, 21 N. Y. 186; Reading v. Waterman, 46 Mich. 107, 8 N. W. 691; Noland v. Bank of Lee's Summit, 129 Mo. 57, 31 S. W. 341.

Notice of sale must be published six times, successively, in a weekly paper. McDonald v. Nordyke Marmon Co. 9 N. D. 290, 83 N. W. 6; Cotton v. Horton, 22 N. D. 1, 132 N. W. 225.

Publication in a legal newspaper of the county in which the land is situated is sufficient. Rev. Codes 1905, §§ 2279, 7459; Smith v. Commercial Nat. Bank, 7 S. D. 465, 64 N. W. 529; Trenery v. American Mortg. Co. 11 S. D. 506, 78 N. W. 991.

Mere inadequacy of the price at which the land sells at foreclosure sale is not sufficient ground for setting sale aside. Grove v. Great Northern Loan Co. 17 N. D. 352, 138 Am. St. Rep. 707, 116 N. W. 345.

Noble, Blood, & Adamson, for respondent.

A person, having the right to exercise a power of sale in a mortgage, must use the utmost good faith and fair dealing towards the mortgagor or owner, and mere technical compliance with the statute is insufficient. Hedlin v. Lee, 21 N. D. 495, 131 N. W. 390 and cases cited; State ex rel. Kunz v. Campbell, 5 S. D. 636, 60 N. W. 34; Stacy v. Smith, 9 S. D. 137, 68 N. W. 198.

Courts of equity will scrutinize with care sales made under powers contained in mortgages, and great inadequacy of consideration will call for careful research and examination of the facts to justify annulling the sale. Longwith v. Butler, 8 Ill. 32; Briggs v. Briggs, 135 Mass. 306; Clark v. Simmons, 150 Mass. 357, 23 N. E. 108; Montague v. Dawes, 14 Allen, 369; Drinan v. Nichols, 115 Mass. 353; Thompson v. Heywood, 129 Mass. 401; Flint v. Lewis, 61 Ill. 299; Webbers v. Curtiss, 104 Ill. 309; Stewart v. Hamilton Bldg. & L. Asso. — Tenn. —, 47 S. W. 1106.

Such sales made to a mortgagee or to his assignee will be viewed with more suspicion than when made to third persons. 27 Cyc. 1483, and cases cited.

The statutes of this state allow a mortgagee, his assignee, or other

legal representative to "fairly and in good faith" purchase the premises. Rev. Codes, 1905, § 7463.

The officer who makes the sale must also act in good faith towards the mortgagor, and see that the sale is fairly and honestly conducted. Campbell v. Swan, 48 Barb. 109; Harrison v. McHenry, 9 Ga. 164, 52 Am. Dec. 435.

The notice of mortgage sale by advertisement must be signed by the person in whom reposes the power of sale. Hebden v. Bina, 17 N. D. 235, 138 Am. St. Rep. 700, 116 N. W. 85.

It is an essential quality that the published notice of sale appear to be given by competent authority, and not by a mere stranger. Niles v. Ransford, 1 Mich. 342, 51 Am. Dec. 95; Bausman v. Kelley, 38 Minn. 197, 8 Am. St. Rep. 661, 36 N. W. 333; Roche v. Farnsworth, 106 Mass. 509; Dunning v. McDonald, 54 Minn. 1, 55 N. W. 864.

SPALDING, Ch. J. The trial court found that the sale was invalid, holding that the failure of defendant to record his assignment until the 6th day of March, 1908, the publication of the notice of sale in the Lansford Times, the purchase by the defendant for the sum of $113.32, in the absence of any bidders or bids at the sale, and permitting the tenant of the plaintiff to remain in possession after the sale, and to pay rent during the period for redemption to the plaintiff, without knowledge of the foreclosure on the part of either tenant or plaintiff, and in permitting plaintiff to pay interest on the first mortgage for the year 1908, after the commencement of foreclosure proceedings and without knowledge thereof, and permitting the tenant to remain in possession during the year 1909 and raise a crop thereon without any knowledge on the part of the tenant or plaintiff,—entitled plaintiff to a vacation of such sale and deed, on the ground that such acts constitute bad faith on the part of defendant; and it awarded the plaintiff judgment, and required the defendant to accept the sum of $170.20, which plaintiff had deposited with the clerk of the court for satisfaction of the mortgage foreclosed. We say here that there is no evidence in the record to sustain the finding of the trial court that there were no bidders at the sale. We shall separately examine the questions raised.

1. We need not determine whether a bid by the sheriff, when acting as auctioneer or salesman, under the power of sale and under the stat-

ute, might be valid. We do not construe the instructions and the act of the sheriff in striking off the premises in question to defendant as a bid by the sheriff. The instructions transmitted to him by Bosard & Ryerson were, in legal effect, a written bid by defendant for a specified sum of the amount stated to be due in the notice of sale plus the costs of sale, and was a proper and customary method of making a bid in this state. It simply amounted to an instruction that the defendant bid that sum, and that it could be struck off to him if no one bid more. It in no manner intimated to him that anything should be done to prevent others bidding a greater sum.

2. Here inadequacy of price at a foreclosure sale is not a ground on which to set aside a foreclosure in the absence of fraud, undue advantage, or prejudice. Grove v. Great Northern Loan Co. 17 N. D. 352, 138 Am. St. Rep. 707, 116 N. W. 345. This is the rule which is established in this state, and we think it especially applicable where the purchaser at the sale is the holder of the mortgage. What might be an inadequate price at an ordinary auction sale may not be so at a foreclosure sale when the purchase is made by the mortgagee as the highest bidder. To illustrate, it is contended in this case that the actual value of the premises in question, relieved of the two mortgages, is, say $4,000, although there is not much, if any, proof to sustain this figure; but assume it to be $4,000. We have no statute providing for an appraisal of lands sold under any method of foreclosure, and no limitation is placed on the amount for which it may be sold. The mortgagee has a right to his security. It is his privilege, and the law recognizes it as such, to protect his security. To this end he is authorized to purchase at the foreclosure sale. If we were to hold that he is compelled, in order to render the sale valid and protect his debt, to pay the full value that the mortgagor places upon the land, he would, in the absence of higher bidders, be compelled to advance, in a case like this, several times the amount of his mortgage to give him any protection. He must, in such case, not only be willing to take the land, but he must be willing to pay its actual value, and must have the means with which to do it. In this case, if the valuation placed upon the land is $4,000 he would have been required, in order to protect his $113.32 to advance nearly $3,900. This would be an unreasonable and oppressive requirement, and might destroy his mortgage security. We

find no law making this necessary. When he has bid the amount of the mortgage debt and costs, in the absence of higher bidders, he has paid all that the law requires, or that, under circumstances which do not show bad faith conclusively, is incumbent upon him to bid; and the price is adequate under the circumstances, although it might not be adequate if bid at an auction sale not made under foreclosure. The status of this proceeding in this respect was identically the same as though the mortgagee had been present and bid in person. The contention of respondent is answered quite satisfactorily in the opinion in Power v. Larabee, 3 N. D. 502, 44 Am. St. Rep. 577, 57 N. W. 789, where this court, through Judge Corliss, said:

"The reasoning is that there must be at least two bidders at the sale; otherwise, there is no highest bidder. We are clear that this is a too narrow construction of the statute,—one which was never contemplated by the legislature. It would defeat every sale, unless the plaintiff could induce someone to bid upon the property. What the statute clearly means is that, after the public have been fairly notified of the sale, the property shall be sold for the best price that can be obtained. It is not necessary that there should be more than one bidder to make a sale at public auction. It is sufficient if the public has been fully advised of the sale, by legal publication of notice, and have the right to attend and bid. Those who do not attend the sale assert by their conduct that they do not wish the property at any price. Must the plaintiff's right to collect his judgment be forever stayed because he, alone, is willing to buy the property? We have no doubt on this point on principle, and we are able to cite eminent authority to support our view that the absence of all other bidders did not of itself render the sale either void or voidable. Learned v. Geer, 139 Mass. 31, 29 N. E. 215; 2 Freeman, Executions, § 308, pp. 1046, 1047,"

3. The publication of the notice of sale in the Lansford Times was in compliance with the statute governing the publication of such notices. Section 2279, Rev. Codes of 1905, prescribes the qualifications that a newspaper must possess to enable it to publish legal notices; and it is not for the court, in the absence of fraud, when the legislature has expressed its judgment as to such qualifications, to go back of such judgment and set it aside. In the case at bar testimony of a

member of the firm of Bosard & Ryerson clearly eliminates any fraud or fraudulent intent or bad faith in the publication of this notice.

4. The fact that Bailey had no actual knowledge of the foreclosure proceedings is not evidence of fraud. If it might be in any case under our statute, the record in this case, which shows that he was at Minot, at Towner, at Sherwood, at Bottineau, in Ohio and Indiana, and perhaps several other places, during the period involved, and that he did not see the mortgagee or the defendant, and that he left no notice to forward his mail from one place to another, almost precludes the possibility of his receiving notice had any attempt been made to give one, on which subject the record is silent. The statute prescribes the method of giving notice. The notice in this case was published, in accordance with law, in a newspaper qualified under the law, and for the length of time fixed by the law, and such notice has the same binding force that a foreclosure by action has when the defendants therein are personally served with process. Grove v. Great Northern Loan Co. 17 N. D. 352, 138 Am. St. Rep. 707, 116 N. W. 345. The plaintiff knew that he had given the mortgage; he knew that the last payment on it was due several years prior to the commencement of foreclosure proceedings; he also knew that it was unpaid. He was charged with notice of the sale, as the certificate was on record for a year, less a few days, before the deed issued. It was incumbent on him to protect himself. He knew that the mortgage provided for foreclosure by advertisement, and was charged with knowledge of the law on the subject. In the absence of fraud he cannot complain because he received no actual notice of the sale. The law charges him with such notice.

It is argued that the paper must be one of general circulation in the vicinity of the land to render the notice valid. The law does not so state, and even if this be correct the evidence fails to negative this as a fact. Plaintiff did not know of its having subscribers in that neighborhood; but his absence would preclude his knowing, and he is not shown to have made any effort to ascertain the fact. Can it be that a mortgagee, in addition to complying with the statute fully, must, before selecting the paper in which to publish, make an investigation to determine whether the neighbors of the mortgagor are subscribers to this or that paper? The Code makes no such requirement.

5. The six publications in six successive weeks, the last publication being the day before sale, fulfilled the requirements of the statute, § 7459, which provides that notice must be given by publishing the same six times, once in each week, for six successive weeks, in a newspaper of the county where the premises intended to be sold, or some part thereof, are situated. McDonald v. Nordyke Marmon Co. 9 N. D. 290, 83 N. W. 6, where this court said: "When this is done there need be no perplexing computation of days or weeks."

6. The fact that plaintiff paid interest on the first mortgage after the institution of foreclosure proceedings, and that the defendant did not ascertain that fact and prevent his doing so, or that he paid taxes on the premises, under the circumstances of this case, is no badge of fraud, and does not show want of good faith or reason for vacating the sale either in whole or in part. There is no showing that the defendant knew of any such act; and had he known of it, he had a right to assume that the defendant, with full knowledge of the second mortgage, was intending to pay or redeem from it, and it is not even a suspicious circumstance.

7. It is contended that the fact that the plaintiff collected the rent during the year of redemption, and that the defendant did not himself collect it, when he was entitled to the rents during that period, is an element entering into the equities in favor of plaintiff. The statute gives the purchaser at a mortgage sale the right to receive the rents during the year for redemption, but it nowhere makes it obligatory upon him to claim or collect them. He may do so, but if he does not, unless it appears clearly that his purpose in not claiming them is to conceal, from the owner of the right to redeem, the fact of the sale, it cannot be held to prejudice his title acquired by the purchase. In many cases his collection of the rent during the year for redemption would only result in his getting the land for a smaller sum than he bid at the sale. It happens that it would not have resulted so in the instant case, but that does not change the rule of law.

In Folsom v. Norton, 19 N. D. 722, 125 N. W. 310, a crop sown and harvested by the tenant was ripe and severed when the year of redemption expired, and it amounted to more than enough to pay the mortgage debt. The purchaser took it after securing his deed, but that was not held to invalidate the sale. *In that case he received the share of the*

crop constituting the rent; in this case he did not receive it, but the plaintiff did. Had no attempt been made to redeem, this would have inured to the advantage of plaintiff.

The record seems to indicate that defendant was a nonresident of the state; but be that as it may, he may have had no knowledge that the mortgaged land was cultivated or rented during the period allowed for redemption, and before the fact that he failed to collect rent for such period could become a badge of fraud it would, at least, have to appear that he was advised thereof. The record fails to show that he had any knowledge of the fact. It is said in Whithed v. St. Anthony & D. Elevator Co. 9 N. D. 224, 50 L.R.A. 254, 81 Am. St. Rep. 562, 83 N. W. 238, in effect, that the purchaser is required only to credit the amount of rent actually received. See also Pacific Mut. L. Ins. Co. v. Beck, — Cal. —, 35 Pac. 169.

8. But it is next contended that the delay of the defendant in recording the assignment of the mortgage by the Mohall State Bank to him is a badge of fraud or evidence of bad faith, and should be taken into consideration, in support of the judgment of the trial court. The purpose of recording an assignment of a mortgage is the protection of the mortgagee, and under our statute it does not constitute notice of the assignment to the mortgagor. There is no requirement that it be recorded except for the purpose of qualifying the assignee to foreclose by advertisement, and as it may affect a satisfaction. The purpose of this requirement has no bearing on the rights of the parties, but is to insure a continuity in the chain of title. The plaintiff never examined the records to ascertain whether there were assignments of the mortgage, and never made inquiry, as far as disclosed by the evidence. He never inquired of Grace, the original mortgagee, as to the mortgage being due, or made any attempt or took any steps to pay it. He proceeded in utter disregard of the mortgage. How, then, can it be said that he is prejudiced by the failure of defendant to promptly record the assignment? Defendant recorded it some time prior to the commencement of the foreclosure proceeding. It was necessary for him to record it before instituting the foreclosure by advertisement, and we see no element of bad faith in this delay.

9. It is next contended that inasmuch as a less portion of the land than the whole would have paid the mortgage debt, the sale was invalid

because the whole tract or farm was sold. Section 7462, Rev. Codes of 1905, provides that if the mortgaged premises consist of distinct farms, tracts, or lots they must be sold separately. The recitals of the sheriff's certificate—and there is no evidence to the contrary—disclose that the sale was conducted in full compliance with this statute; at any rate he has no ground for complaint; that 40-acre tracts were first offered, then 80-acre tracts, and, there being no bidders, the whole quarter section was offered and sold. The land was in one tract or parcel and constituted one farm, and the sale in this manner in no way interfered with the plaintiff's right to redeem, nor in any manner prejudiced him. This point is fully covered in Power v. Larabee, 3 N. D. 502, 44 Am. St. Rep. 577, 57 N. W. 789, and other reasons are given in that case for sustaining the proceedings, so far as regularity of the sale is concerned, which we shall not take the time to repeat or quote. It is sufficient to say that it is there held that when the mortgagor waited sixteen months after the sale and four months after the time for redemption had expired, before questioning the sale, he waived his right to have it set aside for inadequacy of price, and because of irregularity in selling separate parcels in one mass. But in that case over 1,700 acres were sold for $96, and the land was worth at least $6,800. It consisted in eleven distinct parcels, and was sold in one lump. See also 2 Jones, Mortg. § 1857.

It is contended that Hedlin v. Lee, 21 N. D. 495, 131 N. W. 390, fully sustains the trial court on the questions that we have thus far considered. In many respects that appeal involved proceedings conducted similarly to those in the case at bar, but one very important fact existed there which is not found here, and it was the determining fact which branded the whole proceeding with bad faith. It was found that, prior to the commencement of the foreclosure proceedings, plaintiff, in good faith, offered to pay the sum due; that he deposited in a bank the amount then due, lacking 35 cents. The mortgagee refused to receive the money; that on the mortgagor's attempting to pay the mortgage the mortgagee refused to furnish the information requested as to the amount due; that the mortgagor made known to the mortgagee his desire and ability to pay whatever was then due, and that the acts of the mortgagee operated as a waiver of a formal tender; and the court there held that these facts had a direct bearing on the good faith of the mort-

gagee in exercising the power of sale, and that, with this positive evidence on the subject, other acts might be considered.

Many authorities are cited from other states, claimed to be applicable, but we find none of them in point, except possibly some from Massachusetts. Most of them are where a direct conspiracy or some similar act was found, intended to prevent a fair sale of the premises. In some the sales were in private offices, and not at the place for holding public sales, or where the public would be attracted. In Massachusetts the courts, undoubtedly owing to the better established price of real property and the greater possibility of securing bidders therefor, hold very strictly on the subject. Then, again, we think that most of the authorities relied on were in the case of trust deeds, and the rule seems to be that less strictness is required in the case of a mortgagee purchasing at his own sale under a power of sale contained in a mortgage, than in the case of a trustee purchasing; and some authorities are from states where the sale is the final act to consummate the transaction and no period for redemption is provided, and a greater degree of care and strictness is then properly imposed upon the mortgagee or trustee. We are not quite able to understand how, when a multiplicity of acts is required on the part of a mortgagee in the foreclosure of his mortgage, and each act, taken separately, is done in full accordance with the law, when taken altogether they show bad faith or a want of good faith. To so hold would invalidate titles to thousands of farms in this state. It has always been construed by the profession as legal to advertise in any paper qualified under the provisions of the statute, whether located at the county seat or near the land or not; and that, in the absence of other badges of fraud, the location of the paper, when in the county as required by § 7459 and qualified as required by § 2279, is insufficient to invalidate a foreclosure sale. We also know that in but an infinitesimal percentage of such sales is there any competition in bidding, and to hold that there must be more than one bidder would make necessary one of two things,—either that the mortgagee should secure the attendance of by-bidders, or that his security would be rendered ineffective and valueless.

10. It is also urged that the fact that the notice of sale was not signed in the name of the assignee of the mortgage renders the sale invalid. The notice was signed by the sheriff and by "Bosard & Ryerson, At-

torneys for Assignee, Mohall, N. D." The body of the notice gave the name of the assignee, the date of the record of the assignment, and the book and page where it was recorded. While the purpose of our statute, providing for foreclosure by advertisement or through the execution of a power of sale, contained in the mortgage, requiring the record of all assignments, is to provide a perfect and complete chain of title as far as the mortgage and all of its incidents are concerned, it further requires the recording of a power of attorney from the holder of the mortgage to the attorney making the foreclosure, authorizing him to foreclose. This power of attorney must be recorded when the sale is made, and presumably such power was of record in the case at bar. The burden was on the party seeking to avoid the sale to show that it was not. He has not done so, and taking the allegations of the notice, which show the assignment and the signature of the attorneys as attorneys for the assignee, the chain of title is rendered complete so far as it relates to the mortgage. It shows an assignment to Hendrickson, and presumably a power of attorney to Bosard & Ryerson to foreclose, and the foreclosure made by that firm, and the sale. The appending of the name of the assignee of the mortgage to the notice would render the chain of title no more complete than it is already shown to be, and we think the omission of the signature did not render the notice inadequate or the sale invalid. One or two authorities are cited to the effect that it is necessary that it be appended, but they are from jurisdictions where the power of attorney, if any, is not required to be of record. Tending to support our conclusions, see Woonsocket Inst. for Sav. v. American Worsted Co. 13 R. I. 255; Menard v. Crowe, 20 Minn. 448, Gil. 402; note in 75 Am. Dec. page 711. The question seems analogous to that of notice of sale under execution, and it seems to be universally held that the omission of the name of the execution creditor to the notice of execution sale is immaterial where his name appears in the body of the notice. There is no statutory requirement in this state that the name of the mortgagee or the assignee of the mortgage be appended to the notice of sale. Had the legislature deemed it essential that this be done, it would undoubtedly have made such a requirement in connection with the provision for the recording, etc., of assignments.

Summarizing briefly our views, we may say that to grant the contention of respondent and set aside this sale, in an action brought more

than a year and nine months after the sale, and more then nine months after the execution and delivery of the sheriff's deed, when the mortgagee has fully complied with the requirements of the statute regarding foreclosures under a power, and in view of the testimony of the attorneys foreclosing as to their reason for giving the notice in the paper in which it was published, would be to repeal by judicial fiat the laws enacted by the legislative assembly providing for foreclosure of real estate mortgages under a power of sale. It might render invalid a great proportion of such foreclosures heretofore made in this state, and this with no authorities cited, which we deem in point, to sustain the action of the trial court. Numerous Massachusetts cases have been called to our attention, but in Massachusetts there is no right of redemption after the sale. Furthermore, their laws do not provide the safeguards around the sale which are provided in this state. When the right to redeem ceases at the time of sale, the sale becomes, in effect, like any other auction sale, and affords an inducement to purchasers to buy. They know that they are then getting the land the same as at any public auction. They know what they are getting; but in this state where a year is given, after the sale, before title passes, and it is subject to redemption during that time, there is no such inducement to bidders, and in fact in many cases there is no bidder except the mortgagee. The mortgagor has the whole year in which to protect his interest, in addition to the time which may elapse between default and sale, and the lower the successful bid the less he has to pay to redeem. It will thus be seen that his equities are far superior here to those of the mortgagor in a state where there is no redemption after sale, and courts in states like Massachusetts are warranted in exercising greater leniency towards the mortgagor than here.

Without unduly extending this opinion, we call attention to a few of the authorities cited. In Clark v. Simmons, 150 Mass. 357, 23 N. E. 108, the sale was adjourned from time to time without any new publication or any notice of any adjournment except by oral proclamation by the auctioneer. The sale did not take place until three months after the time advertised, and then was for much less than its market value. A second mortgagee had requested to be notified when the sale would take place, but the notice was given him without stating the hour or place of sale; and the record shows that he had been unable, upon in-

quiry, to learn anything about it. It appears that the mortgagee knew that the second mortgagee desired to protect his mortgage, and in effect had assumed the duty of giving him information as to when and where the sale would occur. This duty he did not perform, and it was held that, under such circumstances, good faith had not been exercised. It further appears that the adjournments were made with no one present except the auctioneer and the agent of the mortgagee; hence the notices of adjournments were no notice whatever to the world. The complaining party was the second mortgagee, who was relying upon the express or implied agreement of the first mortgagee to inform him of the time and place of sale.

In Thompson v. Heywood, 129 Mass. 401, the circumstances surrounding the notice of sale were held to show a failure to comply with the law on that subject, and the hour at which the sale was set was so early in the morning as to be unreasonable, and express fraud was shown in other respects. It was also shown that the purchaser was a participant in the fraud. It does not appear that the statute in that state defines the qualifications which must be possessed by a newspaper to make publication therein legal publication, but rather the contrary seems to appear.

In Montague v. Dawes, 14 Allen, 369, the notice was too meager to give the necessary information as to the place of sale and other particulars; and the sale took place at a private office in a private building, a place at which the public would not think of looking for the sale of such premises. In the case at bar the sale took place at the place fixed by law, and where all such sales occur. There were other particulars in the last case cited, which went to the merits and good faith in the conduct of the sale. These citations are sufficient to illustrate the lack of value of the Massachusetts cases as authority, particularly in view of there being no redemption after sale.

We do not question the correctness of the principles announced regarding good faith on the part of the mortgagee; but in the case at bar the mortgagee was not present, either in person or by attorney, nor was any agent appointed by him present. The auction was conducted by the sheriff, who is made, by statute, auctioneer. The mortgagee had no choice in the selection of the auctioneer, and is therefore not charged, to the same extent, with his acts or failure to act that he would be had

he been employed by himself. North Dakota Horse & Cattle Co. v. Serumgard, 17 N. D. 466, 29 L.R.A.(N.S.) 508, 138 Am. St. Rep. 717, 117 N. W. 453.

Illinois cases are also called to our attention, but in that state it appears that there is no redemption allowed after foreclosure sale; and, without referring directly to authorities from that state, we may say that they mostly relate to sales conducted by trustees named by the parties in trust deeds. Numerous cases are found and called to our attention which are inapplicable, because they relate to objections made to the confirmation of a sale on foreclosure by action. It is clear that when objection is made to the confirmation of a sale before the rights of parties have become established, the court will be justified in considering objections which are of less weight than would be sufficient to set aside a deed long after its execution and delivery, where all the proceedings were in conformity with the statute. A large number of authorities on the subject are cited in the notes to § 628, Wiltsie on Mortgage Foreclosure, 3d edition.

We regard Richards v. Holmes, 18 How. 143, 15 L. ed. 304, as a controlling authority in this case, and that the only distinction which can be drawn between the two cases is that in that case the auctioneer was in fact and law the bidder for the creditor, while in the case at bar, as we have held, he was not a bidder, but received a bid in writing. He was not instructed by the mortgagee or his attorneys, in the instant case, to get it for the least sum possible. He was instructed to bid a certain amount, and this carried the understanding that he should bid no more, and that if others offered more they would get it. Hence it conveyed no intimation that he was to act in contravention of the interests of the mortgagor, or to keep down or reduce the price. In the last case cited the Supreme Court of the United States says: "An agency simply to bid a particular sum for a purchaser, amounting to no more than receiving from the purchaser, before the auction, a bid which is to be treated as if made there by the purchaser himself, is not necessarily inconsistent with any duty of the auctioneer, and does not enable anyone to avoid the sale."

The instructions in the case at bar, given the sheriff, were given without regard to the presence or absence of other bidders, and with no knowledge as to whether others would be present. It is perfectly

clear that the price bid by the defendant was more than any other person was willing to give, after fair and legal notice of the sale.

It is held in Worley v. Naylor, 6 Minn. 192, Gil. 123, that a sale is legal when made on the same day as the last publication of the notice, under the rule regarding the computation of time. In the case at bar the sale did not occur until the next succeeding day, and whether or not there was time for bidders residing at a distance from the county seat to attend, after the last publication, is immaterial; there had been other publications, and to hold that every possible bidder must have actual notice of the time, place, and fact of sale would be absurd. The rule announced in Richards v. Holmes, supra, is that it is only some practice to prevent bidding, or to procure a sale for less than the property would otherwise have brought, which can be relied upon by the complainants to avoid the sale.

It may be conceded that some of the grounds alleged for holding the sale invalid might have a tendency to show it so had they been supported by proof of the knowledge or purpose of the assignee of the mortgage, but unsupported they are without significance. The plaintiff had the protection the law afforded him. Legal notice was given him, and, as held by this court in prior decisions, he was charged with knowledge of the foreclosure proceedings. The statute does not make it incumbent upon the mortgagee to give the mortgagor personal notice. It does not charge him with the burden of seeking the debtor and demanding payment of the debt. The debt is payable at a specified place, and the debtor is charged with knowledge that he owes the obligation, when it will be due, where it is payable, and with the duty of making payment at such time and place. We cannot comprehend how the debtor may have grounds for complaint because he was permitted to collect two years' rent, one during the year of redemption and the other the year following the issuance of the sheriff's deed. He charges that this, particularly the rent for the last year, was permitted to be collected by him to conceal from him the fact of sale; but we are not advised as to how a concealment of the fact of sale after the sheriff's deed had issued and was on record would have resulted to the advantage of the mortgagor. If the fact of his being permitted to receive the benefit of rent for two years might, under other circumstances, constitute evidence of bad faith on the part of the mortgagee, it certainly cannot, in the case

at bar, in the absence of a showing that the mortgagee knew that the premises were occupied by a tenant, or even cultivated or in rentable condition. Proof of bad faith or fraud should be at least reasonably clear and definite, and courts should not be asked to infer fraud from acts which in themselves are innocent, when not explained in any manner inconsistent with innocence or good faith. Plaintiff asks us to surmise, in effect, that bad faith was exercised, notwithstanding every act was performed in accordance with the statute, and because, after all the acts were performed and the sheriff's deed issued and recorded and title vested, he collected rent to his own advantage. We are thus asked to cast upon the mortgagee the burden of knowing more about the premises, its occupancy, the crops, and what takes place with reference to them, than the mortgagor himself knew. In other words, we are asked to excuse the ignorance or lack of information of the mortgagor, but to charge the mortgagee with knowledge of all the facts which it was possible to know, and among them the very facts which we are asked to excuse the mortgagor from knowing or acting upon. Neither the circumstances nor the law make any such requirement.

We regret that the mortgagor has not been able to realize his expectations regarding his property, but he is the party responsible for this failure, and we see no way, without violating the law ourselves, to relieve him from his own negligence. The judgment of the District Court is reversed, and it is directed to enter judgment in favor of the defendant.

FISK, J. (dissenting). I am compelled to dissent from the views of my associates as expressed in the opinion of the chief justice. The majority decision reverses the judgment of the district court, and confirms as valid a title obtained through a mortgage foreclosure by advertisement, and a sheriff's deed to a quarter section of land concededly worth at least $4,000 for a paltry debt of about $50, and the costs of foreclosure. The purchaser at the sale and the person to whom the sheriff's deed runs was the holder of the mortgage, and the rights, therefore, of an innocent purchaser are not involved. The principles announced in Hedlin v. Lee, 21 N. D. 495, 131 N. W. 390, are in the main analogous to the case at bar, and, in my opinion, should be controlling.

As I view it, the basic fallacy in appellant's position, as well as in that of my associates, consists in the assumption that because, forsooth, the assignee of the mortgage and his attorneys in foreclosing such mortgage *literally* complied with the words of the statute relative to foreclosures by advertisement, that this is all that is "nominated in the bond," and that the purchaser is entitled to his "pound of flesh." While I entertain the highest regard for the attorneys who conducted this foreclosure, and do not for a moment question their good faith, and with all due respect for the opinions of my associates, I feel constrained to differ from them. A construction of our statute to the effect that a literal compliance with its provisions is all that is requisite to devest the mortgagor of his title and vest the same in the purchaser at a foreclosure sale is, I believe, unwarranted. I cannot subscribe to the doctrine that, because the *letter* of the statute is complied with, if the notice of foreclosure sale is published for the requisite period in "a newspaper of the county where the premises intended to be sold are situated," that this alone suffices. The legislative purpose in requiring the publication of such a notice evidently was to attract the attention of those persons who would be likely to become prospective bidders at the sale; the end in view, of course, being to protect the rights of the interested persons by securing competitive bids at the sale, and thus avoiding a sacrifice of the property. I deny that the court is judicially legislating when it places a construction upon the statute which will tend to effectuate the evident legislative purpose as above stated.

The only notice given in this case was by publication in a weekly newspaper published at Lansford, a small village some 22 miles distant from the land, and having no circulation in the vicinity thereof. It might just as well have not been published at all in so far as being of any actual benefit is concerned. It was not a paper nearest the land, nor the most likely nor reasonably likely to accomplish the purpose intended by the legislature. I do not contend that any hard and fast rule should be laid down in such cases, nor do I contend that the sale should, for this reason alone, be set aside; but I do assert that where, as in this case, no bidders were present and the land was struck off to the mortgagee pursuant to a letter of instruction containing his bid for the paltry sum due him with costs, that it will be presumed that the power of sale was not exercised fairly and in good faith as the law requires.

I venture the assertion that no one can properly contend, under the facts, that in equity and good conscience this plaintiff should be deprived of a right to redeem, even though the year for redemption under the statute has expired. The price was so grossly inadequate as to shock the conscience of the chancellor. The fact that plaintiff did not redeem within the year, coupled with the further facts that the defendant allowed him to pay the taxes on the land and the interest on the first mortgage, is, to my mind, conclusive of the fact that plaintiff did not know of the existence of such second mortgage, nor of the foreclosure sale. Of course if he gave the mortgage he is presumed to have had knowledge of it, but he evidently had overlooked or forgotten it. Another quite significant fact which should not be overlooked is that, so far as this record discloses, and no doubt the fact is, that no effort whatsoever was made by defendant to collect the amount of this second mortgage without foreclosure. While it is true, this was not legally necessary, yet it is what most people would do and what fair dealing with a fellow man demands, and for defendant not to do so is a circumstance showing a want of good faith on his part.

I shall not take the time nor the space required in order to review the authorities. I take it to be well settled that the powers of sales in mortgages must be exercised in the utmost good faith, and that under facts such as are here disclosed the court should and will diligently "scrutinize the conduct of the party placed by the law in a position where he possesses the power to sacrifice the interests of another in a manner which may defy detection," and "should stand ready to afford relief on very slight evidences of unfair dealing, whether it be made necessary by moral turpitude or only by a mistaken estimate of others' rights." As very aptly said by the supreme court of South Dakota, "A court of equity in the exercise of its equitable powers will scrutinize with care sales made under powers of sale contained in a mortgage, and where there is great inadequacy of consideration it will be astute in extracting from the facts of the case sufficient to justify annulling the same." Story v. Smith, 9 S. D. 137, 68 N. W. 198. See also Hedlin v. Lee, 21 N. D. 495, 131 N. W. 390.

In conclusion, I believe the trial court was fully justified in granting relief to plaintiff, and that its decision should be affirmed.

THE CITY OF DICKINSON, a Municipal Corporation, v. J. S. WHITE and The Northern Trust Company, a Corporation.

(143 N. W. 754.)

Action by municipality — treasurer's bond — trial — evidence — findings.

1. In an action by a municipality upon the official bond of its treasurer to recover for alleged defalcations, a jury was waived, and the trial court found that during the treasurer's second term he was short in the sum of $645.11, and that during his third term the aggregate shortages amounted to more than the penalty in the bond, and he allowed a recovery for such latter shortages in the sum of $2,000, the penalty of the bond with interest. Evidence examined and *held* amply sufficient to sustain such findings.

Evidence — receipts — county treasurer — report by city treasurer — city council — competent proof.

2. Plaintiff, instead of introducing the books of the city in evidence for the purpose of establishing the shortages alleged, proved the same by introducing in evidence certain receipts given by its treasurer to the county treasurer for sums paid by the latter to the former as the proceeds of taxes collected and belonging to the city, and it followed this proof by official reports made by its treasurer to the mayor and city council wherein lesser amounts were reported. Sufficient foundation was laid for the introduction of these receipts and reports. *Held*, that such testimony made a prima facie case for the city as against both the treasurer and his surety. The prima facie case thus established is fully corroborated by the testimony of its extreasurer and other witnesses. *Held*, that such proof was competent and amply sufficient to establish the alleged shortages.

Pleading — sufficiency of complaint — challenged — findings — errors.

3. The question of the sufficiency of the complaint to state a cause of action is not challenged by certain assignments of error merely attacking certain findings as not supported by the evidence.

Shortage proven — presumption — term of office.

4. A shortage shown to exist at a certain time will, in the absence of proof to the contrary, be presumed to have arisen on account of defalcations occurring during that term of office, and not to include shortages occurring in previous terms.

County warrant — fraudulent issue by auditor — shortage — liquidation.

5. The evidence discloses that defendant White, the extreasurer of the plaintiff and the principal in the bond sued upon, was also county auditor of S. county, and to cover up an admitted shortage in his account as city treasurer

existing on July 14, 1909, he issued a fraudulent county warrant payable to another, and indorsed the payee's name upon the back, and on such date deposited the same in the First National Bank of Dickinson, such bank giving him credit as city treasurer on its books for said amount. The trial court found, and such finding is supported by ample evidence, that the bank received such warrant merely for collection, and that thereafter, on discovering the fraudulent character of the warrant, they charged such credit off its books by debiting White, as city treasurer, with the amount of such warrant.

Held, that the above transaction did not operate to liquidate such shortage so as to exonerate White's surety on his official bond.

Defalcations — interest on allowed — recovery — penalty of bond.

6. The trial court allowed plaintiff interest at the rate of 7 per cent per annum on the amount of such shortage shown to exist from the expiration of White's term in which such shortages arose.

Held, that such allowances were sufficiently favorable to appellant. The fact that the recovery, including interest, exceeded the penalty of the bond, does not render the allowance of interest unwarranted.

Rehearing — evidence — remittitur — costs — statute of limitations.

7. Upon a rehearing and a reconsideration of the evidence relative to the extent of a shortage which occurred in White's account with the City of Dickinson during his last term, *held* that such evidence is insufficient to support a finding that such shortage amounted to $2,150. The fair import of the testimony warrants a finding merely that such sum constitutes the aggregate amount of all shortages occurring in that and the two prior terms. A new trial is accordingly ordered unless plaintiff elects, within thirty days from the date of filing the remittitur, to remit from the judgment the portion in excess of $2,050, with interest and costs, the cause of action to recover for the shortage of $100 shown to have occurred during the first term being barred by the statute of limitations.

Presumption as to shortage — terms of office — rule not applicable.

8. The presumption that a shortage shown to exist in a certain term is presumed to have occurred during that term is, for reasons stated, held not applicable.

Interest on surety bond — breach — notice thereof to sureties — demand.

9. On such rehearing we recede from the views expressed in our former opinion relative to the time from which interest may be computed, and it is *held*, as against sureties on official bonds, that interest may be reckoned only from the date of notice to the sureties of the breach, or from the date of a demand on them to make good such breach. No notice or demand having been shown, interest is allowed only from the date the action was commenced.

Opinion filed June 13, 1913. On rehearing October 22, 1913.

Appeal from District Court, Stark County, *Crawford*, J.

From a judgment in plaintiff's favor, defendant, The Northern Trust Company, appeals.

Affirmed, on condition.

Pierce, Tenneson, & Cupler, for appellant.

The bank purchased the warrant, placed it on its books as a proper credit, and it could not be charged back. Such transaction was *closed*, and it constituted payment. Bryan v. First Nat. Bank, 205 Pa. 7, 54 Atl. 480.

A sale is shown where a check is accepted as cash, and amount checked out, and pass book afterwards written up without charging back the check. Taft v. Quinsigamond Nat. Bank, 172 Mass. 363, 52 N. E. 387; National Surety Co. v. State Sav. Bank, 14 L.R.A.(N.S.) 155, 84 C. C. A. 187, 156 Fed. 21, 13 Ann. Cas. 421; State ex rel. Livesay v. Harrison, 99 Mo. App. 57, 72 S. W. 469; Friedlander v. Texas & P. R. Co. 130 U. S. 425, 32 L. ed. 994, 9 Sup. Ct. Rep. 570.

The title to the amount of money represented by the warrant became and *was vested in the city*. Custer County v. Walker, 10 S. D. 594, 74 N. W. 1040.

No portion of a trust fund can be devested, to pay the trustee's individual debt to the bank. 5 Cyc. 550, 551, note 57; Central Nat. Bank v. Connecticut Mut. L. Ins. Co. 104 U. S. 54, 26 L. ed. 693.

Where the facts are such that no loss can have been suffered, no interest is allowed. In the absence of notification, interest is only allowable from the issuance of the writ. Trumpler v. Cotton, 109 Cal. 250, 41 Pa. 1033, 1036; 1 Brandt, Suretyship & Guaranty, 3d ed. § 126.

H. A. Burgeson and *T. F. Murtha*, for respondent.

The receipts given by White for moneys received were competent evidence. Our statutes make them such. Rev. Codes 1905, §§ 7298, 7299.

It was the duty of the city treasurer to give a receipt. Rev. Codes 1905, § 2711.

The amount of recovery is limited to the principal of the bond, plus interest from the date of the breach. Getchell & M. Lumber & Mfg. Co. v. Peterson, 124 Iowa, 599, 100 N. W. 550; Thomssen v. Hall County, 63 Neb. 777, 57 L.R.A. 303, 89 N. W. 393; Clark v. Wilkinson, 59 Wis. 543, 18 N. W. 481; Whereatt v. Ellis, 103 Wis. 348, 74 Am.

St. Rep. 865, 79 N. W. 416; McMullen v. Winfield Bldg. & L. Asso. 64 Kan. 298, 56 L.R.A. 924, 91 Am. St. Rep. 236, 67 Pac. 892; Griffith v. Rundle, 23 Wash. 453, 55 L.R.A. 381, 63 Pac. 199; Rev. Codes 1905, §§ 2707, 2713.

FISK, J. The city of Dickinson sues to recover against J. S. White, its ex-city treasurer, and against his surety, the Northern Trust Company, upon certain official bonds given by the said White as such city treasurer, it being plaintiff's contention that the said White defaulted and failed to account for city funds collected and received by him in his said official capacity.

The defendant White was not served with process, and made no appearance in the action, and the Northern Trust Company alone appeals.

A jury was waived and the cause tried to the court, resulting in findings and conclusions favorable to the plaintiff on the second and third causes of action, but holding that the first cause of action was, at the time this action was commenced, barred by the statute of limitations.

The statement of facts in appellant's brief is substantially correct, and we quote from the same as follows:

"The defendant J. S. White was elected treasurer of the city of Dickinson for three successive terms of two years each, commencing in April, 1904, and ending in April, 1910. He executed his three official bonds, one dated April, 1904, the second dated April, 1906, and the third dated April, 1908, each covering a period of two years from its date, and each for the sum of $2,000. The defendant, the Northern Trust Company, was surety upon each of these three bonds. In April, 1911, the city of Dickinson commenced this action upon all three bonds to recover an alleged shortage in the accounts of said White.

"White was also city treasurer from 1900 to April, 1904, but the Northern Trust Company was not surety on his bond during that period.

"The first cause of action is based upon the bond dated April, 1904, to which the Northern Trust Company answered, denying that any shortage existed, and also pleading the statute of limitations. As the court found that the first cause of action was barred by the statute of limitations, all allegations of the complaint and answer with refer-

ence to the first cause of action, as well as Exhibits 7, 8, 11, and 12, and testimony offered in connection with same, are immaterial.

"The second cause of action is based on the bond executed in April, 1906, which is the same in form as Exhibit A. Paragraph VI. of the second count of the complaint alleges 'that the defendant J. S. White did, during his said term of office and in his capacity as such officer, collect as taxes various sums of money, amounting in the aggregate to the sum of $6,285.11, and that of this said amount the said J. S. White accounted for and paid over to the plaintiff the sum of $5,640,' making an alleged shortage of $645.11 under the second cause of action. This was denied by the Northern Trust Company.

"The third cause of action is based on the bond executed in April, 1908, which is the same in form as Exhibit A, and paragraph VI. of the third count of the complaint alleges that said White failed to account for the sum of $909.88 for taxes collected, and further alleges 'that the said J. S. White, in his capacity of said officer and under color thereof, did deposit to his credit as city treasurer a number of worthless warrants purporting to have been drawn on Stark county, North Dakota, the said warrants having been repudiated by said Stark county, and the same were returned by banks holding same as deposits to the said defendant, J. S. White, as city treasurer, and same were charged to the plaintiff, together with interest thereon amounting to the sum of $6,807.96. A list of said purported warrants is hereto attached and marked Exhibit D and made a part hereof.' Exhibit D, so far as material, refers to warrant of Stark county No. 12,627, for $2,150 alleged to have been deposited in the First National Bank of Dickinson on July 14, 1909. The allegations of this paragraph were denied by the answer of the Northern Trust Company.

"To prove the alleged shortage under the second count, plaintiff offered in evidence Exhibit 9, purporting to be a report of J. S. White to the city council for March, 1908, and Exhibit 13 which purports to be a receipt by White to the county treasurer, dated March 31, 1908, for taxes.

"To prove the alleged shortage under the third count, plaintiff offered in evidence Exhibit 10, purporting to be a report by White to the city council for February, 1909, and Exhibit 14, which purports to be a receipt by White to the county treasurer dated February 23,

1909. Also under the third count, plaintiff offered in evidence Exhibit 15, purporting to be a warrant for $2,150, the slip showing its deposit to the credit of J. S. White, city treasurer, marked 19, the debit slip of the bank marked Exhibit 20, and the page of the cash book of the city marked Exhibit 21, all of which were objected to. Exhibits 20 and 21 were made February 10, 1910. White ceased to act as city treasurer December 16, 1909.

"The purported reports of White to the city council, Exhibits 9 and 10, were received in evidence over objection that they were incompetent, not the best evidence, and shown to be mere copies. The books of the city or of White were not produced in court nor offered in evidence. The purported receipts to the county treasurer, Exhibits 13 and 14, were received in evidence over objection that they were incompetent, and no proper foundation laid.

"There was no further evidence of shortages than that alleged to have been caused by these Exhibits 9, 10, 13, and 14, and the court found that under the second cause of action a shortage of $645.11 had been proved to exist in March, 1908, and that a shortage of $841.68 had been proved to exist under the third cause of action in February, 1909.

"The court further found with reference to the third cause of action that on July 14, 1909, the date the warrant was deposited and credited by the bank to White's account, he was short in his accounts in excess of the sum of $2,150. The court does not find how or when such shortage was caused, nor its amount; and it must have included the amounts stated above, as the court found that they existed prior to July 14, 1909.

"The only testimony in any way supporting such finding was that of J. S. White, which was objected to by us, and is indefinite and uncertain.

"Exhibit 15 was received in evidence over objection that it was incompetent, irrelevant, and immaterial, not proved to be a forgery, and on the further ground that it had been purchased by the First National Bank of Dickinson from White, and was the property of said bank, and that the bank had no right or authority to charge it back to the city.

"J. S. White kept an account at the First National Bank of Dickin-

son in the name of 'J. S. White, City Trs.,' and the warrant Exhibit 15 was received from White by Alphonzo Hilliard, the president, on July 14, 1909. The deposit slip, Exhibit 19, was made out and the amount of the deposit, including Exhibit 15, was credited to White's account, as city treasurer.

"T. Arthur Tollefson, who testified for plaintiff, has been assistant cashier of the First National Bank of Dickinson since November, 1908, and succeeded White as city treasurer. He testified that it was the custom of the bank to carry, as cash items, warrants taken by the bank under the same circumstances as Exhibit 15, and then take the lot of warrants after they are registered by the county treasurer, and put them into 'loans and discounts;' that this was done with Exhibit 15, and that such warrants, even while carried as cash items and before they were placed in the loans and discount ledger, belonged to the bank. Exhibit 15 was deposited July 14, 1909, and was presented by the bank to the county treasurer on the same day and registered by him for payment. It was not 'charged back' by the bank until February 10, 1910, and then the account of 'J. S. White, city trs.,' was debited with the amount shown by Exhibit 20. On that date, and after the amount of the slip Exhibit 20 was charged against the account, the city still had a balance there, and it is shown by White's bank book, Exhibit A1, that he had $10,396.90 in that account on September 1, 1909, which was subsequent to the date the court found all of the alleged shortages to have occurred.

"The court found that plaintiff was entitled to recover $645.11 and interest from May 1, 1908, upon the second count and bond, and $2,000 and interest from May 1, 1910, on the third count and bond, or a total of $3,018.30 on the two bonds. Judgment was entered against the Northern Trust Company accordingly on November 30, 1911. A statement of the case was duly settled by the Northern Trust Company and this appeal taken from the judgment. The errors assigned for reversal are insufficiency of the evidence and errors of law in the admission and exclusion of evidence."

The assignments of error relied on by appellant will be considered in the order in which they are presented in the printed brief.

Assignments numbered 1, 2, and 12 relate to certain rulings of the trial court admitting in evidence Exhibits 9, 10, 13, and 14. This

proof was offered for the purpose of proving the default of $645.11 alleged in the second cause of action, and the default of $909.88 alleged in the third cause of action. Exhibits 13 and 14 are receipts given by White as city treasurer to the county treasurer for moneys received by the former from the latter. White signed such receipts, and they were shown to be records in the office of the county treasurer. Such Exhibits are as follows:

Exhibit 13

No. 1134 City Treasurer's Office $6,285.11

City of Dickinson, N. D., March 31, 1908.

Received of John Riessbeck, Co. Treasurer,

Sixty-two Hundred Eighty-five and 11-100 ..... Dollars

Taxes

J. S. White,
City Treasurer.

Exhibit 14

No. 1203 City Treasurer's Office $909.88

City of Dickinson, N. D., Feb. 23, 1909.

Received of John Riessbeck, Co. Treasurer,

Nine Hundred and Nine and 88-100 ..... Dollars

Taxes

J. S. White,
City Treasurer.

These receipts furnish prima facie evidence of the fact that White, as city treasurer, received from the county treasurer the amounts therein mentioned. Rev. Codes 1905, §§ 7298 and 7299. It was White's duty to give receipts for moneys thus received. Section 2711, Rev. Codes 1905. Appellant's counsel does not controvert the correctness of the above proposition; but they contend that this was not the proper method of proving the alleged shortages. Plaintiff, after introducing the above receipts, offered in evidence Exhibits 9 and 10, which consist of reports made by White, as city treasurer, to the mayor and city council of Dickinson on March 31, 1908, and on February 27, 1909, purporting to show the receipts and disbursements made by him as such city treasur-

er for the months of March, 1908, and February, 1909, respectively, and in which reports White accounts and reports for the sum of only $5,640 for moneys received from the county treasurer for taxes in March, 1908, whereas Exhibit 13 shows that he received $6,285.11, making a difference of $645.11 as found by the trial court in its fifth finding of fact; and, by Exhibit 10 he accounts for and reports as having received from the county treasurer the sum of only $67.20, whereas by the receipt Exhibit 14 he admits that he received $909.88, making a difference of $842.68. Counsel for appellant urge that this method of proving shortages is improper, and that plaintiff should have shown the total amount of money received and expended by White during the terms of the bonds, or either of them, and they emphasize the fact that there was no proof offered as to what amount White had paid over and accounted for to his successor in office, nor of the amount for which he thus should have paid out and accounted for, and that the books of the city were not offered in evidence or produced in court for the purpose of showing these facts. They also contend that Exhibits 9 and 10 were improperly received in evidence, as they were not the original records, and were incompetent, and not the best evidence, and no foundation had been laid for their introduction. We think appellant's contentions are untenable. The proof offered by the plaintiff, in the absence of any showing to the contrary, constituted prima facie evidence that White had not accounted for the moneys thus received by him as shown by said Exhibits 13 and 14, and that there were, therefore, shortages in the sums above mentioned. While the method of proof suggested by appellant's counsel of establishing such alleged shortages would be proper and perhaps preferable, such method is not the sole and only method of proving such facts, and it was perfectly proper for plaintiff to show that White had receipted for specific moneys belonging to the city, and had reported to the mayor and city council lesser amounts than those for which he had thus receipted. As before stated, in the absence of proof to the contrary, this constituted prima facie evidence of the existence of shortages and the amount thereof; and if such shortages had been subsequently made up or adjusted, such fact could have been shown by the defendant.

Sufficient foundation for the introduction of all of the Exhibits aforesaid was laid by the testimony of White, who identified all of

such Exhibits as the receipts and reports made and signed by him, and that the difference in the amounts received, and reported as having been received, has never been made up. Exhibits 9 and 10 are the original reports made by White, as city treasurer, and the objections to their introduction in evidence were clearly untenable. The fact that in making such reports the *data* therefor were taken or copied from the books kept by him as city treasurer does not render them inadmissible as secondary evidence. They were made pursuant to official duty, and were originals, and not mere copies.

White distinctly testified that the difference in the receipts as shown by Exhibits 13 and 14 and by these reports, Exhibits 9 and 10, was never made up by him, and he is corroborated in this by the testimony of R. C. Hill, the city auditor, and by T. Arthur Tollefson, the city treasurer. We conclude that the findings of fact numbered 5 and 8, the correctness of which are challenged by the above assignments, are amply supported by the evidence.

By finding 8 the trial court also found that on July 14, 1909, a shortage existed in White's account of a sum in excess of $2,150, and such finding is the basis for assignments of error 8, 9, and 12.

In support of these assignments, counsel for appellant contend that the complaint fails to state a cause of action in so far as the item of $2,150 is concerned. We quote from their brief: "It alleges that the warrant was deposited by White to his credit as city treasurer, and that afterwards it was repudiated by Stark county and charged back against the account by the bank. The city could suffer no damage by this transaction, for it received credit for the amount of the warrant when it was deposited, and the credit was only balanced by the debit when the warrant was charged back. If the defendant is liable to plaintiff, it must be by reason of a shortage in White's accounts. The deposit and charging back of the warrant was immaterial without an allegation that there was then a shortage in White's accounts. The complaint therefore fails to state a cause of action, and does not support finding 7 and for this reason the judgment must in any event be modified."

What we deem to be a conclusive answer to such contention is the fact that such assignments do not challenge the sufficiency of the complaint at all, but they merely challenge the sufficiency of the evidence to sustain the said 8th finding, and the correctness of the trial court's

rulings on certain objections interposed by defendant to certain questions asked the witness White, and in receiving his answers thereto, by which testimony White admitted that he had used the city's money to an amount in excess of $2,150, and that the void county warrant, Exhibit 15, was deposited to cover the shortage thereby occasioned.

We think White's testimony was clearly competent, and is amply sufficient to justify the court's finding, number 8, to the effect that there existed a shortage in White's account with the city on July 14, 1909, of over $2,150, and that such shortage does not include the amount alleged and found to have been embezzled from the city by such witness during his previous terms.

It will be presumed, in the absence of proof to the contrary, and none is disclosed in this record, that the shortage thus shown to exist in July, 1909, was created during that term, and the burden was on defendant of showing that it was created during a prior term. Pine County v. Willard, 39 Minn. 125, 1 L.R.A. 118, 12 Am. St. Rep. 622, 39 N. W. 71; McMullen v. Winfield Bldg. & L. Asso. 64 Kan. 298, 56 L.R.A. 924, 91 Am. St. Rep. 236, 67 Pac. 892; Kelly v. State, 25 Ohio St. 567; Hetten v. Lane, 43 Tex. 279; Board of Education v. Robinson, 81 Minn. 305, 83 Am. St. Rep. 374, 84 N. W. 105.

Assignment numbered 13 is closely related to the subject-matter covered in the last assignments of error, and may properly be here considered. It is contended under this assignment that the amount of the alleged shortage on July 14, 1909, was not shown, nor was it shown how or when it was caused, and that consequently such shortage must be deemed to have included therein all prior shortages. While it is true, the testimony does not disclose the exact amount of such shortage, it does disclose that it was in excess of $2,150.

As we have above decided, such shortage will be presumed to have arisen during the current official term in which it was discovered; and this precludes us from holding that such shortage embraces the items shown to have been converted or embezzled during White's prior terms of office. But as to the item of $841.68, which shortage took place in February, 1909, it may have been included in the larger amount shown to have existed in the following July. However, such fact may be conceded, and still the finding of fact, number 8, must remain undisturbed, as it in no manner tends to prejudice this appellant, for the

reason that the total recovery allowed under the third cause of action was $2,000, the amount of the bond, with interest.

Assignments 3 to 7 inclusive relate to the transaction between White and the bank, whereby the former, as city treasurer, deposited in the latter on July 14, 1909, Exhibit 15, being the fraudulent county warrant for $2,150, which was credited to White's account and subsequently charged off by the bank. Appellant's contention as to the legal effect of such transaction is stated in its brief as follows:

"It is our contention: (1st) That the bank purchased the warrant, and, having acquired title to it, could not legally charge it back; (2d) that whether the warrant was purchased or merely taken for collection, the bank dealt with White as an individual in receiving it from him, and the credit to the city's account was a distinct and voluntary act on the part of the bank, done for White's accommodation; and (3d) that if the warrant was repudiated by Stark county, the bank might recover the amount from White, but could not legally recover it from the city or charge it against the account of the city and render the Northern Trust Company liable."

Appellant's counsel rely chiefly upon the case of National Surety Co. v. State Sav. Bank, 14 L.R.A.(N.S.) 155, 84 C. C. A. 187, 156 Fed. 21, 13 Ann. Cas. 421. We shall not take the time to analyze the holding in this case, for, conceding that it supports appellant's contention, it apparently stands alone as an authority. There is a strong dissenting opinion by Judge Hook; and, moreover, this case was later before the circuit court of appeals and an opposite conclusion reached. See National Surety Co. v. Arosin, 117 C. C. A. page 313, 198 Fed. 605. It is true, the former opinion was not expressly reversed, and the later decision seems to be placed upon a somewhat different state of facts from those disclosed on the former appeal. In fact, the first decision reversed the lower court in sustaining a demurrer to the bill of complaint, and the second affirms the lower court's decision after trial upon the merits based upon admissions in the pleadings and upon an agreed statement of facts, the court holding that no recovery could be had by the surety company. We think the second decision clearly sound, and it supports respondent's contention in the case at bar. We feel constrained to differ from appellant's counsel on each of their contentions under these assignments. We are unable to reach the conclusion that by

such transaction the shortage of $2,150, which existed on July 14, 1909, was liquidated so as to exonerate the surety company from liability to the city. We must uphold the trial court's finding to the effect that the bank received this county warrant from White merely for collection, as such finding has ample support in the testimony. That the president of such bank acted in such transaction in unquestionable good faith and without any knowledge of the fraudulent character of said warrant is not questioned by appellant, and must, from the record, be accepted as an established fact in the case. There is nothing in the evidence to support counsels' contention in effect that the president of such bank was negligent in not discovering the character of such warrant, and therefore should be held to have voluntarily come to White's rescue by aiding him to liquidate the same to the city, and herein lies the distinction between the case at bar and some of the authorities cited in appellant's brief. Under the circumstances we think the bank had a legal right, both as against the city and the surety company upon discovering the fraudulent character of such warrant, to charge off the tentative or conditional credit which it had given White's account on its books at the time of receiving such warrant for collection. Especially ought this to be true as against White and his surety, this appellant.

Appellant's last assignment challenges the ruling of the trial court in allowing interest at the rate of 7 per cent per annum on the shortages found to exist as alleged in the second and third causes of action. It is asserted that no demand was made on this appellant for the payment of the shortages, except such demand as the bringing of this action constituted, and that interest cannot be allowed except from the date of a demand. It is also contended by appellant that the interest and principal together should not exceed the penalty of the bond, and, lastly, that the rate of interest allowed should not exceed 3 per cent per annum, as the evidence shows that this was the amount received by the city on deposits of its funds, and is the highest rate provided by law for deposits by cities. We do not think there is any merit in these contentions. Under the weight of authority interest is allowable from the date of the default, but in the case at bar interest was allowed only from the date of the expiration of White's term of office, at which date it was his duty to account for and pay over to his successor all funds then chargeable to him. In view of the trial court's decision, allow-

ing interest merely from the date of the expiration of White's respective terms of office, it is unnecessary for us to determine whether interest should have been computed from an earlier date. The following authorities clearly sustain the allowance of interest in this case: Getchell & M. Lumber & Mfg. Co. v. Peterson, 124 Iowa, 599, 100 N. W. 550; Thomssen v. Hall County, 63 Neb. 777, 57 L.R.A. 303, 89 N. W. 393; Clark v. Wilkinson, 59 Wis. 543, 18 N. W. 481; Whereatt v. Ellis, 103 Wis. 348, 74 Am. St. Rep. 865, 79 N. W. 416; McMullen v. Winfield Bldg. & L. Asso. 64 Kan. 298, 56 L.R.A. 924, 91 Am. St. Rep. 236, 67 Pac. 892; see also note to Griffith v. Rundle, 56 L.R.A. 381.

But appellant's counsel insist that the allowance of principal and interest, as against the appellant, cannot exceed the penalty of the bond, which is $2,000; and they cite § 6101, Rev. Codes, 1905, which provides: "A surety cannot be held beyond the express terms of his contract, and if such contract prescribes a penalty for its breach, he cannot in any case be liable for more than the penalty."

We do not think that it was intended by such statute to change the general rule that interest is recoverable on the full penalty of the bond from the date the liability accrues, where, as in this case, such liability amounts to the penalty named. In other words, the surety is liable for interest on the principal sum, for which it is responsible from the date the same is due and payable, even though the principal and interest exceed the penalty. We think the authorities cited above fully sustain us on this proposition.

We do not think there is any merit whatever in appellant's last contention, that the rate of interest allowed should not exceed 3 per cent per annum.

Finding no error in the record, the judgment is affirmed.

On Rehearing.

FISK, J. A rehearing having been granted herein, a reargument upon certain points has been had, and at this time we will briefly consider such points.

Upon the question as to the legal effect of the transaction between White and the bank relative to the deposit of the fraudulent county

warrant for $2,150, and the credit of such sum to White's account as city treasurer on the books of the bank, we are constrained to adhere to the views formerly expressed. The trial court found that such warrant was taken by the bank merely for collection, and such finding is, on this appeal, entitled to the same weight as the verdict of a jury, it having substantial support in the evidence.

Upon the question of the amount which plaintiff is entitled to recover, we have, upon further consideration, reached the conclusion that we committed error in our former opinion in holding that the evidence warrants a finding that a shortage arose during White's last term in the sum of $2,150. Such finding rests solely upon White's admission that on July 14, 1909, the date of the deposit of the fraudulent county warrant as aforesaid, he had used the city's money to the amount of $2,150 or more. We formerly construed such admission as sufficient to warrant the trial court's third conclusion, to the effect that White had embezzled during his third term a sum in excess of the penalty of the bond, and consequently that defendant is liable on the third cause of action in the full penalty of its bond, $2,000, with interest. We feel constrained to modify the foregoing opinion in this respect, and to hold that the third conclusion of the trial court has support neither in the findings of fact nor in the evidence. The finding number 8 is substantially in accord with White's testimony to the effect that on July 14, 1909, he was short in his account with the city, and had appropriated to his own use moneys of such city in excess of the sum of $2,150. In the light of the testimony as to the three specific defalcations which the testimony shows occurred prior to July 14th, one of which took place during such third term, and none of which had ever been accounted for, we are unable to construe White's testimony as an admission that the item of $2,150 was exclusive of these prior defalcations. It can, we think, just as reasonably be construed as including, or intending to include, all such prior shortages in making up the sum total of $2,150. We are not warranted in interpreting as *exclusive,* rather than *inclusive,* of such prior defalcations. Plaintiff had the burden of establishing the extent of such defalcations, and it failed to sustain such burden as to any defalcations in excess of those aggregating the sum of $2,150. We do not think the presumption that a shortage shown to exist in a certain term is presumed to have oc-

curred during that term obtains where, as in this case, the contrary is equally as probable. In other words, there is no room for such presumption where it appears, or is probable as in this case, that prior shortages shown to have arisen *during* other terms may have been included in making up a shortage shown to have existed during a subsequent term. The fair import of the testimony therefore does not, in our judgment, warrant us in sustaining a recovery in excess of $2,050 and interest, this being the aggregate of all the shortages proved, less the shortage which arose during the first term, a recovery for which was denied by the trial court for the reason that the cause of action was barred by the statute of limitations.

We are also constrained to recede from the views expressed in our former opinion as to the date from which interest may be computed. We think the weight of modern authority, as well as the better reason, allows interest as against sureties on official bonds only from the date of notice to the sureties of the breach, or a demand on them to make good such breach. We find support for this in the following authorities, as well as others not cited:

1 Brandt, Suretyship & Guaranty, 3d ed. 126, and cases cited; Murfree, Official Bonds, § 689; 16 Am. & Eng. Enc. Laws, 1043 and cases cited; 22 Cyc. 1543, and cases cited; Frink v. Southern Exp. Co. 82 Ga. 33, 3 L.R.A. 482, 8 S. E. 862; Curtis v. United States, 100 U. S. 119, 25 L. ed. 571. See also valuable note to Griffith v. Rundle, 55 L.R.A. 381, where the modern rule is stated and the authorities collated. See Folz v. Tradesman's Trust & Sav. Fund Co. 201 Pa. 583, 51 Atl. 379; Trumpler v. Cotton, 109 Cal. 250, 41 Pac. 1033, 1036; Pennsylvania Co. v. Swain, 189 Pa. 626, 42 Atl. 297; Thomas Laughlin Co. v. American Surety Co. 51 C. C. A. 247, 114 Fed. 627; American Surety Co. v. Lawrenceville Cement Co. 110 Fed. 717.

The evidence fails to disclose any notice to appellant of such breach or any demand upon it to respond prior to the commencement of this action. Interest should therefore be computed only from the date the action was commenced.

The foregoing conclusions necessitate a reversal of the judgment and a new trial, unless respondent elects to remit therefrom all sums in excess of $2,050, and interest as aforesaid, and the costs and dis-

bursements as taxed. Such election may be exercised within thirty days from the date of the filing of the remittitur in the court below.

The cause is remanded for further proceedings in accordance with the views herein expressed.

STATE OF NORTH DAKOTA, EX REL. LUTHER E. BIRDZELL, Frank E. Packard, and George E. Wallace, Members of the North Dakota Tax Commission v. CARL O. JORGENSON, as State Auditor.

(— L.R.A.(N.S.) —, 142 N. W. 450.)

Mandamus — writ — state government — prerogatives — rights — franchises — supreme court — original jurisdiction.

1. An application to the supreme court for a writ of mandamus directed to the state auditor, to require him to credit to the account of the state board of tax commissioners under authority of chapter 303 of the Laws of 1911, and to issue warrants upon the state treasurer to pay the salaries and meet the expenses of said commission, involves the prerogatives, rights, and franchises of the state government, and invokes the original jurisdiction of the supreme court.

State board of tax commissioners — taxing power — state officers.

2. The members of the state board of tax commissioners created by chapter 303 of the Laws of 1911, and who by such act have been vested with a general supervisory power over the various taxing agencies and boards of review of the state, and with the power to themselves assess in certain instances, are held to be state officers.

Appropriation — no express words necessary.

3. No express form of words is necessary to constitute a valid appropriation.

Tax commissioners — salary — fixing — appropriation.

4. Section 5 of chapter 303 of the Laws of 1911, which provides that "each of said commissioners shall receive an annual salary of $3,000, payable in the same manner that the salaries of other state officers are paid," is held to constitute a valid annual appropriation of $9,000.

Tax commissioners — meeting — secretary — appropriation.

5. Section 6 of chapter 303 of the Laws of 1911, which provides that "the

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Note.—The question of the requisites of an appropriation for official salary or expenses is discussed in notes in 16 L.R.A.(N.S.) 631; 27 L.R.A.(N.S.) 537; and 22 Am. St. Rep. 640.

commissioners first appointed under this act, after having duly qualified, shall without delay meet at the capitol at Bismarck, and shall thereupon organize by electing a secretary, who shall receive a salary of not more than $2,400 per annum," is held to create a valid annual appropriation of $2,400.

Tax commissioners — clerks — stenographers — compensation — appropriation.

6. Section 7 of chapter 303 of the Laws of 1911, which provides that "the commission may, in addition to secretary provided for in § 6 of this act, also employ such other persons as clerks, stenographers, and experts as may be necessary for the performance of the duties required of the commission. The commission shall fix the compensation of such secretary, clerks, stenographers, and experts employed by them, but the total amount expended for that purpose shall not exceed $6,000 per annum," is held to constitute a valid annual appropriation of $6,000.

Tax commissioners — office at capitol — supplies — appropriation.

7. Section 8 of chapter 303 of the Laws of 1911, which provides that "the commission shall keep its office at the capitol, and shall be provided with suitable rooms, necessary office furniture, supplies, stationery, books, periodicals, and maps; and all necessary expenses shall be audited and paid as other state expenses are audited and paid. The commissioners, secretary, and clerks and such experts and assistants as may be employed by the commission shall be entitled to receive from the state their actual necessary expenses while traveling on business of the commission; such expenditure to be sworn to by the party who incurred the expense, and approved by the chairman of the commission, or a majority of the members of such commission, but the total amount to be expended for such office supplies and traveling expenses shall not exceed the sum of $4,500," is held to constitute a valid annual appropriation to the amount of $4,500.

Appropriation — funds — act — purpose.

8. Section 14 of chapter 303 of the Laws of 1911, which provides that "there is hereby annually appropriated out of any funds in the state treasury not otherwise appropriated, the sum of $3,000, or as much thereof as may be needed, for the purpose of carrying out the provisions of this act," is *held* to constitute a valid annual appropriation of $3,000.

Meaning of words — construction — intention — subject.

9. The meaning of the word "until," except when actually defined by the statute, must depend upon the intention of those using it, as manifested by the context and considered with reference to the subject to which it relates.

Appointment — statute — construction.

10. The word "until," as found in § 3 of chapter 303 of the Laws of 1911, which provides that "if such appointment be made when the legislature is not in regular session, the appointee shall hold his office until the third Monday in

January in the next biennial session of the legislature, when if such appointment is not confirmed by the senate, the office shall become vacant," is held to include the said third Monday in January.

Words — meaning — construction.

11. The word "is" often has, and in this case is held to have, a future meaning. It is not synonymous with "shall have been."

Phrases — construction — intention.

12. The clause, "when if such appointment is not confirmed," refers to a future, and not to a past, transaction.

Vacancy — appointment — relating to future.

13. That portion of § 3 of chapter 303 of the Laws of 1911, which provides that "in case of vacancy, it shall be filled by appointment by the governor for the unexpired portion of the term in which such vacancy shall occur, subject to confirmation by the senate; if such appointment be made when the legislature is not in regular session, the appointee shall hold his office until the third Monday in January in the next biennial session of the legislature, when, if such appointment is not confirmed by the senate, the office shall become vacant," is *held* to relate to appointments which are made or have been made to fill vacancies in the tax commission occurring after the appointment of the first three commissioners provided for in § 2 of the act, and not to relate to the first three commissioners appointed on July 1, 1912, and under the authority of said act.

Tax commissioners — appointment — confirmation.

14. Sections 2, 3, and 15 of chapter 303 of the Session Laws of 1911, construed and *held* that the first three commissioners provided for by said act and under authority of § 2 thereof could legally be confirmed at any time during the legislative session of 1913, and were so legally confirmed.

Opinion filed June 17, 1913.

Mandamus by the State on relation of Luther E. Birdzell, Frank E. Packard, and Geo. E. Wallace, members of the North Dakota tax commission, against Carl O. Jorgenson, as State Auditor.

Writ allowed.

Statement by BRUCE, J.

This is an application to the supreme court for a writ of mandamus, and an appeal to its original jurisdiction. The petition has affixed to it the indorsement of the attorney general, and is as follows:

"Frank E. Packard, being first duly sworn, says that he is a duly appointed, qualified, and acting member of the tax commission of the

state of North Dakota, and makes this affidavit in behalf of himself, Luther E. Birdzell, and George E. Wallace, who are also members of said tax commission; that during the twelfth session of the legislative assembly in and for the state of North Dakota, an act was passed and became a law, creating a nonpartisan tax commission in and for the state of North Dakota, the same being chapter 303 of the Session Laws of 1911; that under and by virtue of the provisions of said law, the petitioners were each, on the 2d day of July, 1912, duly appointed to the office of tax commissioner, said Luther E. Birdzell being appointed for a term beginning July 2, 1912, and ending the 1st Monday in May, 1915; said Frank E. Packard being appointed for a term beginning July 2d, 1912, and ending the 1st Monday in May, 1917; and the said George E. Wallace being appointed for a term beginning July 2d, 1912, and ending the 1st Monday in May, 1919; that each of said persons did thereafter, in the manner prescribed by law, duly qualify for such office, and that each of said persons still holds such office and is regularly performing the duties thereof; that during the legislative session of 1913, the appointments of each and all of said persons was confirmed by the senate, as required by law. That Carl O. Jorgenson, the defendant herein, is the duly qualified and acting state auditor of the state of North Dakota; that the petitioners herein, under and by virtue of § 5 of chapter 303 of the Session Laws of 1911, are each entitled to the salary therein provided, as members of said commission, and that the salary due to each of the petitioners for the month of April, 1913, is $250, and that the same was due and payable on the 1st day of May, 1913, under and by virtue of said § 5 of chapter 303 of the Session Laws of 1911, and that no part of said salary has been paid, nor has any warrant been issued authorizing or directing the payment of the same or any part thereof. That appropriation is made by law for the payment of said salaries by virtue of § 391 of the Revised Codes of North Dakota for 1905, and § 5 of chapter 303 of the Session Laws of 1911, and that there is money not otherwise appropriated available for the payment of said salaries; that it is the duty of the defendant herein as state auditor to draw warrants for the payment of the salaries due to the said petitioners, as herein above set forth; that each of said petitioners did demand of the defendant herein on the 1st day of May, 1913, that he issue a warrant for the payment of his salary, but that

the defendant did refuse to issue said warrants in violation of his legal duty in the premises; that said defendant still refuses to issue warrants to the petitioners herein, authorizing and directing the payment of said salaries. That from time to time, as warrants have been issued for the salaries of the said commissioners, the amounts of said warrants have been charged against the specific annual appropriation contained in § 14 of chapter 303 of the Session Laws of 1911, whereas the same are proper charges against the appropriation for the salaries of state officers, provided in § 391 of the Revised Codes of 1905. That under and by virtue of chapter 7 of the Session Laws of 1909, there is appropriated out of the general fund, $37,500 annually for the purpose of capitol maintenance, such sum being placed at the disposal of the board of trustees of public property for the purpose of providing all necessary furniture, fuel, lights, stationery, postage, express, freight, drayage, and all other supplies for the state officers and executive mansion, and the public grounds and parks connected therewith; that from time to time the tax commission has, with the approval of the board of trustees of public property, obtained stationery, postage, and express service, the bills for the same having been duly approved, audited, and paid; that the state auditor did charge the amounts of the various bills for stationery, postage, and express and other necessary supplies furnished to the tax commission against the specific $3,000 appropriation contained in said § 14 of chapter 303 of the Session Laws of 1911; that by virtue of § 8 of chapter 303 of said Session Laws of 1911, said items of expense are properly chargeable against the appropriation for capitol maintenance, found in chapter 7 of the Session Laws of 1909. That under and by virtue of chapter 186 of the Session Laws of 1907, there is appropriated out of the general fund the sum of $30,000 annually for the purpose of providing for public printing for the various state officers and departments; that from time to time printing has been supplied to the tax commission upon requisition, in regular manner as prescribed by law, and that bills for the same have been duly audited and paid and the amounts of the same have been charged by the state auditor against the specific appropriation contained in § 14 of chapter 303 of the Session Laws of 1911, whereas, under and by virtue of said § 8 of said chapter 303 of the Laws of 1911, the said charges are proper charges against the said public printing appropriation contained in

chapter 186 of the Session Laws of 1907. That from time to time, as required by law, the state auditor has issued his warrant, directing the payment of the salaries of employees of the tax commission, and that the same have been paid in regular course, and that the amounts of the various warrants issued for this purpose have been charged to the specific annual appropriation of $3,000 contained in § 14 of chapter 303 of the Session Laws of 1911, whereas the same are a proper charge against the specific appropriation of $6,000 per annum provided in § 7 of the said chapter 303 of the Session Laws of 1911. That the petitioners herein have requested the said Carl O. Jorgenson, as state auditor, to correct his accounts in so far as they pertain to various charges for salaries of the petitioners, secretary, stenographers, and clerks, postage, expressage, traveling expenses, printing, and other supplies, and also, in so far as the said accounts pertain to the crediting of the appropriations to the end that the account be properly stated by him, the said Carl O. Jorgenson, as state auditor, as he is required by law to do; that notwithstanding his duty in the premises, the said Carl O. Jorgenson has refused and still refuses to properly enter said charges and credits, as aforesaid. As special reasons for invoking the original jurisdiction of this court, affiant represents and alleges as follows: That the defendant herein has recently announced his refusal to abide by and follow the opinion of the attorney general to the effect that the salaries of the petitioners are appropriated over and above the $3,000 annual appropriation contained in § 14 of said chapter 303 of the Session Laws of 1911, and that he has consequently refused to credit the account of the tax commission with the amount of said salaries for the year 1913, as was done by his predecessor in office for the semiannual period preceding; that all expense of every kind and character, including salaries of the petitioners herein, employees, printing, postage, books, pamphlets, maps, stationery, records, typewriters, traveling expenses of the members of the commission, and other necessary and incidental expenses of said tax commission, have been charged by this defendant against the appropriation of $3,000 provided by § 14 of said chapter 303 of the Session Laws of 1911, and that the defendant herein refuses to credit the tax commission account with appropriations provided by law; and as a result of the wrongful conduct of the defendant, said appropriation of $3,000 has been exhausted, and no further funds are available, either

for salaries or expenses, with which to conduct said tax commission, and said tax commission is without any funds to enable it to carry out and perform the duties imposed upon it by statute, and that the governmental objects sought to be obtained by the establishment of said commission are rendered impossible of attainment, and are being held in abeyance, and defeated by virtue of said wrongful violation of duty of the defendant herein; that the defendant herein, as state auditor, contends that there is no appropriation for the carrying on of the work of the tax commission and for the fulfilling of the purposes for which the commission was created other than the appropriation of $3,000 named in § 14 of said chapter 303 of the Laws of 1911. That it is essential to the efficient conduct of the work of the tax commission that all obstructions to the prosecution of its work be removed as speedily as possible, if removed at all, for the reasons, among others, to wit: That said tax commission is given power to exercise general supervision over the administration of assessments, boards of review, and boards of equalization, to the end that all assessments of property may be relatively just and equal; to confer with, advise, and direct assessors and boards of review and equalization as to their duties; to review assessments as made by different assessors and as equalized by county boards of equalization, and to order reassessments of property where assessments made seem grossly unjust; that in fulfilling the duties devolving upon the commission in respect to assessments, reassessments, and reviews, the commission has issued instructions to assessors, and the proper exercise of its functions requires that it follow up such instructions with additional instructions to boards of review and equalization, and, where deemed necessary, upon complaint, to order reassessments of property and conduct the same; that the assessments throughout the state are now in process of being made, and that, should this commission be without further funds to prosecute the work, its powers hereinbefore enumerated will be rendered wholly nugatory for the assessment of 1913. That it is the duty of the tax commission to assess light, heat, and power companies throughout the state, and there is no other provision of law now existing, authorizing the assessment of such property; that the commission has taken the preliminary steps necessary to make this assessment for the year 1913, and if without funds to further prosecute its work, such assessment cannot be carried out. That important administrative

functions are vested in the tax commission, under chapter 185 of the Session Laws of 1913, known as the inheritance tax law; that a protracted interruption of the work of the tax commission will hazard the revenues of the state, and will prevent a just and efficient administration of the aforesaid inheritance tax law. That it is made the duty of the tax commission to conduct investigations throughout the state for the purpose of ascertaining the relative tax burdens by all kinds of property within the state; that in performing its duties in this connection, investigations are in progress that require continuity in the prosecution thereof in order to attain the ends sought to be accomplished by this statute and the laws of the state. That the proper and efficient performance of the official duties devolving upon the petitioners requires that they travel from place to place within the state to investigate, confer with, and direct various taxing officials in the performance of their duties, and that as a result of the said wrongful action of the said Carl O. Jorgenson as state auditor, the petitioners are without funds to enable them to so perform their duties. That the duties above enumerated, and other duties which the court can readily ascertain by reference to the aforesaid chapter 303 of the Session Laws of 1911, will be held in abeyance, and an important department of state government rendered wholly inoperative for such period of time as may elapse before a final determination of the matters involved in this application. That your petitioners respectfully represent that judgment of this court upon this application involves the prerogatives, rights, and franchises of the sovereign state of North Dakota, and is a matter affecting the interests of all the people of the state, and that there is not a plain, speedy, and adequate remedy in the ordinary course of law available to compel the issuance of said warrants, and the crediting of the account of the tax commission with appropriations made by law; wherefore, affiant in behalf of himself and the other said members of the tax commission, prays this honorable court that a writ of alternative mandamus may be issued out of and under the seal of this court, directed to said Carl O. Jorgenson, as state auditor, commanding him forthwith to issue warrants in the sum of $250 each to the petitioners herein in payment of their salary for the month of April, 1913, and charge the same to the appropriation for the salary of the state officers, under § 391 of the Revised Codes of 1905, and that he credit the account of the tax commission for the

year 1913 with the amount of $6,000, subject to expenditure by the tax commission for salaries of secretary, clerks, stenographers, and experts, and that he credit the account of the tax commission with $4,500, subject to expenditures by the tax commission for office supplies and traveling expenses, or, in default of his full compliance therewith, that he show cause before your honorable court, at such time as may be fixed by the court, why he has not done so, and that your honorable court may enter such other judgment or order as may be proper in the premises to the end that the petitioners herein may have such relief as they are by law entitled to receive.

An alternative writ was granted and the following answer made:

"The defendant, Carl O. Jorgenson, for the return to the alternative writ of mandamus, avers that he is, and ever since about the 9th day of January, 1913, has been, the duly elected, qualified, and acting state auditor of the state of North Dakota. That on or about the 2d day of July, 1912, the plaintiffs herein were appointed by the governor of the state of North Dakota as members of such commission; that said tax commission was created, and provision for its maintenance was made, by the act of the twelfth legislative assembly of the state of North Dakota, which was approved March 17, 1911, which act is known and designated as chapter 303 of the Session Laws of this state for the year 1911, and entitled: 'An Act to Create a Permanent Nonpartisan Tax Commission, Defining Its Powers and Duties and Making an Appropriation for the Maintenance thereof.' That in and by the terms of said act, as found in § 14 thereof the appropriation referred to in the title was made in the words and figures following, to wit: 'There is hereby annually appropriated out of any moneys in the state treasury not otherwise appropriated the sum of $3,000, or as much thereof as may be needed for the purpose of carrying out the provisions of this act.' That, save as aforesaid, no other appropriation or provision for the funds with which to carry on the business of said commission and pay the salaries of the commissioners and the expenses of their offices was or has been made. That there has been credited to the account of said tax commission, in the office of this defendant as such state auditor, the full amount of said appropriation of $3,000 for the year 1913; and that up to the 1st day of May, 1913, there had been drawn warrants of the state by this defendant against the amount of such appropriation for the salaries

of the members of said commission and their expenses the entire amount of such appropriation, except about the sum of $101, and that on said 1st day of May there remained in the fund so provided insufficient moneys with which to pay the salary of any member of said tax commission. This defendant specifically denies that there has been made any provision whereby the salaries of said commissioners are to be paid out of the general appropriation for salaries of state officers; and further denies that there has been any appropriation providing for the payment of the expenses of said commission for the items of stenography, postage, express, and necessary supplies furnished to said tax commission out of the general appropriation for capital maintenance; and further denies that there has been any appropriation providing for the payment of the expenses of said commission for printing out of the general appropriation for public printing for the various state offices and departments. And in that behalf this defendant respectfully refers this honorable court, and asks the court to take judicial notice of the records of the twelfth legislative assembly of the state of North Dakota relative to the act by which the said tax commission was established and provision made for its maintenance. And herein the court is respectfully referred to page 320 of the house journal under date of February 1, 1911; page 406 of the house journal under date of February 3, 1911; page 408 of the house journal under date of February 8, 1911; page 1669 of the house journal under date of March 2, 1911; page 1894 of the house journal under date of March 3, 1911; page 2153 of the house journal under date of March 3, 1911; page 2157 of the house journal under date of March 3, 1911; and the court is further referred in the same behalf to page 446 of the senate journal for the twelfth legislative assembly under date of January 9, 1911; page 465 of the senate journal under date of February 9, 1911; page 737 of the senate journal under date of February 18, 1911; page 1335 of the senate journal under date of March 2, 1911; page 1392 of the senate journal under date of March 2, 1911; page 1394 of the senate journal under date of March 2, 1911; page 1569 of the senate journal under date of March 3, 1911; page 1584 of the senate journal under date of March 3, 1911; page 1768 of the senate journal under date of March 3, 1911; page 1781 of the senate journal under date of March 3, 1911. The

defendant further alleges that it has been the rule and custom of the office of the state auditor to pay out of the general appropriation for the salaries of state officers and for capitol maintenance and public printing only those salaries and expenses earned and incurred by the regularly elected officers of the state; and that the salaries and expenses of all members of appointive boards, commissions, and bureaus have been paid and charged only to the fund provided by the appropriation for each such board, commission, committee, or bureau. This defendant further alleges that the terms of office of each of the plaintiffs as members of said tax commission expired on the 19th day of January, 1913, under and by the terms of said chapter 303 of the Session Laws of this state for 1911, by reason of the fact that the state senate was regularly in session from the 1st Monday in January, 1913, to and including Saturday, the 18th day of January, 1913, but that during said period and at no time during such session of the senate were the appointments of said plaintiffs as members of such tax commission, or of either of them, confirmed or approved by the senate of this state, as more fully appears by the published proceedings of the senate contained in its journals during said period, to which said journal reference is hereby made for the purpose of this return, and of which proceedings this honorable court is asked to take judicial notice. That by reason of the matters and things hereinbefore set forth this defendant has not issued his auditor's warrants to either of said plaintiffs, as directed by said writ, for the salaries of said officers for the month of April 1913, nor has the defendant credited the account of said tax commission for the year 1913 with the amount of $6,000, subject to expenditure by the tax commission for salaries of secretary, clerks, stenographers, and experts; and that defendant has not credited the account of said tax commission with $4,500, subject to expenditure by the tax commission for office supplies and traveling expenses for the year 1913, or with any other sum or amount save and except as hereinbefore set forth. And the defendant respectfully shows to this court that he is advised and believes that to so issue warrants and so credit said commission with said sum would be a violation of his duties as auditor of the state of North Dakota under the laws of such state. Wherefore, the defendant prays that said writ may be dismissed."

Luther E. Birdzell and *George E. Wallace,* for petitioners.

The questions here at issue involve the prerogatives, rights, and franchises of state government, and the supreme court of this state has original jurisdiction. Const. §§ 86, 87; Rev. Codes 1905, §§ 6751–7822; State ex rel. Goodwin v. Nelson County, 1 N. D. 101, 8 L.R.A. 283, 26 Am. St. Rep. 609, 45 N. W. 33; State ex rel. Moore v. Archibald, 5 N. D. 359, 66 N. W. 234; State ex rel. Wineman v. Dahl, 6 N. D. 81, 34 L.R.A. 97, 68 N. W. 418; State ex rel. Plain v. Falley, 8 N. D. 90, 76 N. W. 996; State ex rel. Wolfe v. Falley, 9 N. D. 450, 83 N. W. 860; State ex rel. Fosser v. Lavik, 9 N. D. 461, 83 N. W. 914; Anderson v. Gordon, 9 N. D. 480, 52 L.R.A. 134, 83 N. W. 993; State ex rel. Granwold v. Porter, 11 N. D. 309, 91 N. W. 944; State ex rel. Buttz v. Liudahl, 11 N. D. 320, 91 N. W. 950; State ex rel. Byrne v. Wilcox, 11 N. D. 329, 91 N. W. 955; State ex rel. Walker v. McLean County, 11 N. D. 356, 92 N. W. 388; Duluth Elevator Co. v. White, 11 N. D. 534, 90 N. W. 14; State ex rel. Mitchell v. Larson, 13 N. D. 420, 101 N. W. 315; State ex rel. Rusk v. Budge, 14 N. D. 532, 105 N. W. 724; State ex rel. Frich v. Stark County, 14 N. D. 368, 103 N. W. 913; State ex rel. Madderson v. Nohle, 16 N. D. 168, 125 Am. St. Rep. 628, 112 N. W. 141; State ex rel. Erickson v. Burr, 16 N. D. 581, 113 N. W. 705; State ex rel. Steel v. Fabrick, 17 N. D. 532, 117 N. W. 860; State ex rel. Cooper v. Blaisdell, 17 N. D. 575, 118 N. W. 225; State ex rel. McCue v. Blaisdell, 18 N. D. 55, 24 L.R.A. (N.S.) 465, 138 Am. St. Rep. 741, 118 N. W. 141; 18 N. D. 31, 119 N. W. 360; State ex rel. Miller v. Norton, 20 N. D. 180, 127 N. W. 717; State ex rel. Williams v. Meyer, 20 N. D. 628, 127 N. W. 834; State ex rel. Miller v. Miller, 21 N. D. 324, 131 N. W. 282; State ex rel. Watkins v. Norton, 21 N. D. 473, 131 N. W. 257; State ex rel. Miller v. Taylor, 22 N. D. 362, 133 N. W. 1046.

The petitioners are state officers, and their duties are therefore of a public nature. 36 Cyc. 852; Mechem, Pub. Off. chap. 1; Throop, Pub. Off. §§ 3, 4. That the petitioners are state officers see: Mechem, Pub. Off. § 35; Throop, Pub. Off. § 10; 36 Cyc. 852; State ex rel. Clyatt v. Hocker, 39 Fla. 477, 22 So. 721, 63 Am. St. Rep. 174, and note following; Re Advisory Opinion to Governor, 49 Fla. 269, 39 So. 63; People ex rel. Foley v. Montez, 48 Colo. 436, 110 Pac. 639; Blue v. Tet-

rick, 69 W. Va. 742, 72 S. E. 1033; Blue v. Smith, 69 W. Va. 761, 72 S. E. 1038.

That specific appropriations are made by law for the purpose of maintaining the tax commission. State ex rel. McDonald v. Holmes, 19 N. D. 286, 123 N. W. 884; Thomas v. Owens, 4 Md. 226; Garr v. State, 127 Ind. 204, 11 L.R.A. 370, 22 Am. St. Rep. 625, 26 N. E. 778; Campbell v. State Soldiers' & S. Monument Comrs. 115 Ind. 591, 18 N. E. 33; Henderson v. State Soldiers' & S. Monument Comrs. 13 L.R.A. 169, and note, 129 Ind. 92, 28 N. E. 127; Ristine v. State, 20 Ind. 338; Reynolds v. Taylor, 43 Ala. 420; People ex rel. Hegwer v. Goodykoontz, 22 Colo. 507, 45 Pac. 414; Proll v. Dunn, 80 Cal. 220, 22 Pac. 143; Humbert v. Dunn, 84 Cal. 57, 24 Pac. 111 (cited with approval) in the late California case of Harrison v. Horton, 5 Cal. App. 415, 90 Pac. 716; State ex rel. Buck v. Hickman, 10 Mont. 497, 26 Pac. 386; State ex rel. Noonan v. King, 108 Tenn. 271, 67 S. W. 812; Kendall v. Raybauld, 13 Utah, 226, 44 Pac. 1034; note to State ex rel. Davis v. Eggers, 16 L.R.A.(N.S.) 630; State ex rel. Brainerd v. Grimes, 7 Wash. 191, 34 Pac. 833; State ex rel. Henderson v. Burdick, 4 Wyo. 272, 24 L.R.A. 266, 33 Pac. 125; State ex rel. Holcombe v. Burdick, 4 Wyo. 290, 33 Pac. 131; 2 Lewis's Sutherland Stat. Constr. §§ 368–370, 594.

"No money shall be paid out of the state treasury, except upon appropriation by law." Const. § 186; Thomas v. Owens, 4 Md. 189; Ristine v. State, 20 Ind. 328; Carr v. State, 127 Ind. 204, 11 L.R.A. 370, 22 Am. St. Rep. 625, 26 N. E. 778; Harrison v. Horton, 5 Cal. App. 415, 90 Pac. 716; State ex rel. Noonan v. King, 108 Tenn. 271, 67 S. W. 812; State ex rel. Brainerd v. Grimes, 7 Wash. 191, 34 Pac. 833.

Where the nature and amount of services rendered the state are definitely fixed, and the compensation therefor limited by law, the duty of auditing and allowing claims for such services becomes a mere ministerial act. Shattuck v. Kincaid, 31 Or. 379, 49 Pac. 758; State ex rel. Henderson v. Burdick, 4 Wyo. 272, 24 L.R.A. 266, 33 Pac. 125.

Section 7 of chapter 303 of the Session Laws of 1911 contains every element essential to make it an appropriation. The same is true of the other sections of our laws, to which attention has been called. Henderson v. State Soldiers' & S. Monument Comrs. 129 Ind. 92, 13 L.R.A.

169, 28 N. E. 127; State ex rel. Henderson v. Burdick, 4 Wyo. 272, 24 L.R.A. 266, 33 Pac. 125.

Barnett & Richardson and *Palda, Aaker, & Greene,* for defendant.

The important point in the determination and construction of *acts* and *laws* is to ascertain the legislative intent.

The language of the *title* of a bill or act is not controlling upon the question of construction, but it is important as throwing light upon the question of *intent.* Reference may also be had to the preamble as an aid in construing a statute. Hahn v. Salmon, 10 Sawy. 183, 20 Fed. 801; Nazro v. Merchants' Mut. Ins. Co. 14 Wis. 295; People ex rel. McCullough v. Pacheco, 27 Cal. 175; Holbrook v. Holbrook, 18 Pick. 248; Church of the Holy Trinity v. United States, 143 U. S. 457, 36 L. ed. 226, 12 Sup. Ct. Rep. 511; Hines v. Missouri P. R. Co. 86 Mo. 629; Coosaw Min. Co. v. South Carolina, 144 U. S. 550, 36 L. ed. 537, 12 Sup. Ct. Rep. 689; Cohen v. Barrett, 5 Cal. 195; People ex rel. Flynn v. Abbott, 16 Cal. 358.

By the act under consideration, the legislature intended to make but one single appropriation for the purposes mentioned, and this to the exclusion of any and all others. Laws 1911, chapter 303; S. D. Sess. Laws (1913) 221.

The intention of the legislature of 1911 was that the expenditures to be made under chapter 303 were limited to $3,000,—the appropriation carried by § 14. That the legislature of 1913 increased such appropriation, by eliminating § 14. The act of the 1913 legislature having been vetoed, the 1911 law remained in force, and no greater appropriation than $3,000 existed. Texas & P. R. Co. v. Interstate Commerce Commission, 162 U. S. 197, 40 L. ed. 940, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666; Ex parte Farley, 40 Fed. 66; Edger v. Randolph County, 70 Ind. 331; Stout v. Grant County, 107 Ind. 343, 8 N. E. 222; Harrington v. Smith, 28 Wis. 43; Hill v. Mitchell, 5 Ark. 608.

It was clearly the intention of the legislature of 1911, that the future life of the tax commission, and the provision for its maintenance, should be left to the legislature of 1913. Atty. Gen. v. Bank of Cape Fear, 40 N. C. (5 Ired. Eq.) 71; Westbrook v. Miller, 56 Mich. 148, 22 N. W. 256; Scanlan v. Childs, 33 Wis. 663; Re Street Opening, 12 Misc.

526, 33 N. Y. Supp. 594; Leddy v. Cornell, 52 Colo. 189, 38 L.R.A. (N.S.) 918, 120 Pac. 153, Ann. Cas. 1913C, 1304.

The use of the words "until" and "when," as found in the act, limits the right of confirmation of these appointments, to a time *before* the third Monday in January, 1913. If not so confirmed, the offices were *vacant* on that day.

Words should be given their ordinary meaning. State ex rel. Cosgrove v. Perkins, 139 Mo. 106, 40 S. W. 650; Maginn v. Lancaster, 100 Mo. App. 116, 73 S. W. 368; Croco v. Hille, 66 Kan. 512, 72 Pac. 208; People ex rel. Cornell S. B. Co. v. Hornbeck, 30 Misc. 212, 61 N. Y. Supp. 978; Ryan v. State Bank, 10 Neb. 524, 7 N. W. 276; Webster v. French, 12 Ill. 302; People v. Walker, 17 N. Y. 502; Willey v. Laraway, 64 Vt. 566, 25 Atl. 435; Bemis v. Leonard, 118 Mass. 502, 19 Am. St. Rep. 470; Hartman v. Ringgenberg, 119 Ind. 72, 21 N. E. 464; Clarke v. New York, 111 N. Y. 621, 19 N. E. 436.

BRUCE, J. (after stating the facts as above). The case before us is clearly one which involves "the prerogatives, rights, and franchises of the state government," and is therefore one in which it is not only the right, but the duty, of this court to exercise original jurisdiction. Constitution of North Dakota, §§ 86, 87; Rev. Codes 1905, §§ 6751, 7822; State ex rel. Goodwin v. Nelson County, 1 N. D. 88 at 101, 8 L.R.A. 283, 26 Am. St. Rep. 609, 45 N. W. 33; State ex rel. Moore v. Archibald, 5 N. D. 359, 66 N. W. 234; State ex rel. Wineman v. Dahl, 6 N. D. 81, 34 L.R.A. 97, 68 N. W. 418; State ex rel. Plain v. Falley, 8 N. D. 90, 76 N. W. 996; State ex rel. Wolfe v. Falley, 9 N. D. 450, 83 N. W. 860; State ex rel. Fosser v. Lavik, 9 N. D. 461, 83 N. W. 914; State ex rel. Granvold v. Porter, 11 N. D. 309, 91 N. W. 944; Anderson v. Gordon, 9 N. D. 480, 52 L.R.A. 134, 83 N. W. 993; State ex rel. Buttz v. Liudahl, 11 N. D. 320, 91 N. W. 950; State ex rel. Byrne v. Wilcox, 11 N. D. 329, 91 N. W. 955; State ex rel. Walker v. McLean County, 11 N. D. 356, 92 N. W. 388; Duluth Elevator Co. v. White, 11 N. D. 534, 90 N. W. 14; State ex rel. Mitchell v. Larson, 13 N. D. 420, 101 N. W. 315; State ex rel. Rusk v. Budge, 14 N. D. 532, 105 N. W. 724; State ex rel. McDonald v. Holmes, 16 N. D. 457, 114 N. W. 367; State ex rel. Frich v. Stark County, 14 N. D. 368, 103 N. W. 913; State ex rel. Madderson v. Nohle, 16 N. D.

168, 125 Am. St. Rep. 628, 112 N. W. 141; State ex rel. Erickson v. Burr, 16 N. D. 581, 113 N. W. 705; State ex rel. Steel v. Fabrick, 17 N. D. 532, 117 N. W. 860; State ex rel. Cooper v. Blaisdell, 17 N. D. 575, 118 N. W. 225; State ex rel. McCue v. Blaisdell, 18 N. D. 55, 24 L.R.A. (N.S.) 465, 138 Am. St. Rep. 741, 118 N. W. 141; State ex rel. McCue v. Blaisdell, 18 N. D. 31, 119 N. W. 360; State ex rel. Miller v. Norton, 20 N. D. 180, 127 N. W. 717; State ex rel. Williams v. Meyer, 20 N. D. 628, 127 N. W. 834; State ex rel. Miller v. Miller, 21 N. D. 324, 131 N. W. 282; State ex rel. Watkins v. Norton, 21 N. D. 473, 131 N. W. 257; State ex rel. Miller v. Taylor, 22 N. D. 362, 133 N. W. 1046; State ex rel. Shaw v. Thompson, 21 N. D. 426, 131 N. W. 231; Atty. Gen. v. Chicago & N. W. R. Co. 35 Wis. 426.

It is a case which is honestly and properly brought by all of the parties to the litigation. It is urged by the tax commissioners, because the law intrusts them with the performance of public duties of great importance which require adequate appropriations for their performance. It is contested by the state auditor, because, as a public official, it is his sworn duty to rigidly and fearlessly perform the duties of his office, and to only audit those accounts for which, in his opinion, valid appropriations have been made. It is his duty to exercise his sound discretion and his best judgment, and to refuse to audit accounts whenever he entertains any reasonable doubt of their validity. It is in the courts alone, that matters such as these can be finally and definitely settled. Ours is a government by law, and by law alone.

The first contention of the petitioners is that § 5 of chapter 303 of the Laws of 1911, and which provides that "each commissioner, within thirty days after notice of his appointment, and before entering upon the discharge of the duties of his office, shall take, subscribe, and file with the secretary of state, the oath of office prescribed by law. Each of said commissioners *shall receive* an annual salary of $3,000, payable in the same manner that salaries of other state officers are paid," makes a continuing appropriation of $9,000 annually for the payment of such salaries, and that it is the duty of the state auditor to draw warrants accordingly without further legislative expression upon the subject.

We think they are correct in this contention. Section 391 of the Code of 1905 provides that "there is annually appropriated out of any funds in the state treasury not otherwise appropriated, such sums as

may be necessary to pay the salaries of the various state officers." The tax commissioners are intrusted by chapter 303 of the Laws of 1911 with important administrative and supervisory functions. They have the power, and it is their duty to exercise supervision over the assessments, and tax laws of the state, over assessors, boards of review, and boards of equalization; to confer with, and advise, and direct assessors and boards; to direct the proceedings, actions, and prosecutions to be instituted to enforce the laws relating to the penalties, liabilities, and punishment of public officers, persons, and officers or agents of corporations for failure or neglect to comply with the provisions of the statute governing the return, assessment, and taxation of property, and to cause complaints to be made against assessors, members of boards of review and of county boards of equalization, in the case of official misconconduct; to require various public officers to report information as to the assessment of property, the collection of taxes, the receipts from licenses, and the expenditures of public funds; to inquire into the system of accounting of public funds in townships, villages, and counties, and to make needed recommendations; to require individuals, partnerships, companies, associations, and corporations to furnish information which may be needful to enable the commission to ascertain the value and relative burdens borne by all kinds of property in the state; to carefully examine into all cases where evasion or violation of the laws for assessment and taxation of property is alleged or discovered; to investigate the tax systems of other states and other countries, and to formulate and recommend such legislation as may be expedient; to consult and confer with the governor of the state upon the subject of taxation, the administration of the laws in relation thereto, and to furnish him from time to time with such assistance and information as he may desire; to assess at their actual value all light, heat, and power companies doing business in this state; to consult and confer with the state board of equalization, and to aid it in the discharge of its duties; to review the assessments made by the different assessors and as equalized by the county boards of equalization, and to order a reassessment of property where the assessment made seems grossly unjust; to require local assessors to place upon the assessment rolls property which may have escaped taxation during the previous six years. They, in short, have administrative and advisory powers which in importance are equal to

those of any other boards or officers of the state. In the case of Parks v. Soldiers' & Sailors' Home Comrs. 22 Colo. 86, 43 Pac. 542, it was held that "every officer of this state who holds his position by election, or appointment, . . . and whose duties are defined by statute, and are in their nature continuous and relate to the administration of the affairs of the state government, and whose salary is paid out of the public funds, is a public officer of either the legislative, executive, or judicial department of the government," and that his salary is therefore a preferred claim against the state. See also People ex rel. Hegwer v. Goodykoontz, 22 Colo. 507, 45 Pac. 414. In 36 Cyc. 852, we find the following: "State officers are those whose duties concern the state at large or the general public, although exercised within defined limits, and to whom are delegated the exercise of a portion of the sovereign power of the state. They are in a . . . sense those whose duties and powers are co-extensive with the state, or not limited to any political subdivisions of the state, and are thus distinguished from municipal officers strictly, whose functions relate exclusively to the particular municipality, and from county, city, town, and school-district officers. . . . The enumeration by the [state] Constitution of certain officers as constituting the executive department of the state does not necessarily deprive the legislature of the power to create other executive offices, although it cannot abolish any of those created by the Constitution." The authorities, in fact, are overwhelming in support of this holding, and we are quite clear that the tax commissioners of North Dakota are state officers. See Mechem, Pub. Off. chap. 1, also § 35, chap. 2; Throop, Pub. Off. § 34, 10; 36 Cyc. 852; State ex rel. Clyatt v. Hocker, 39 Fla. 477, 22 So. 721, 63 Am. St. Rep. 174, and note; Re Advisory Opinion to Governor, 49 Fla. 269, 39 So. 63; People ex rel. Foley v. Montez, 48 Colo. 436, 110 Pac. 639; Blue v. Tetrick, 69 W. Va. 742, 72 S. E. 1033; Blue v. Smith, 69 W. Va. 761, 72 S. E. 1038.

That the provisions of § 5 of chapter 303 of the Laws of 1911, which fix the joint salary of the commissioners at $9,000 per annum, and provides that it shall be payable "in the same manner that salaries of other state officers are paid," taken in conjunction with § 391 of the Code of 1905, which appropriates annually out of "the funds in the state treasury not otherwise appropriated, such sums as may be necessary to pay the salaries of the various state officers," constitutes a valid

appropriation for their said salaries, is also quite clear. In the case of State ex rel. McDonald v. Holmes, 19 N. D. 286, 291, 123 N. W. 884, we said: "From a careful consideration of the authorities on the subject, and of the terms of our Constitution, we think an appropriation in the sense that that word is used in our Constitution is the setting apart from the public revenue of a definite sum of money for the specified object, in such a manner that the officials of the government are authorized to use the amount so set apart, and no more, for that object." Who would contend that there is any indefiniteness in the paragraph of the act of 1911, which provides that "each of said commissioners shall receive an annual salary of $3,000, payable in the same manner that salaries of other state officers are paid?" According to the great weight of authority, this section in itself makes an appropriation, and we so hold. An "appropriation, as applicable to the general fund in the treasury," says the supreme court of Indiana in the case of Ristine v. State, 20 Ind. 328, "may, perhaps, be defined to be an authority from the legislature given at the proper time, and in legal form, to the proper officers to apply sums of money out of that which may be in the treasury, in a given year, to specified objects or demands against the state." In the case of Thomas v. Owens, 4 Md. 189, it was held that a constitutional provision creating officers and fixing salaries amounted to an appropriation for those salaries. The court, in passing upon the case, held that the people had given their consent to the payment of the salary in question, and laid special emphasis upon the words, "shall receive." It is true that in that case the salaries were salaries fixed by the Constitution, but no distinction can be made upon this ground. It is perfectly true, as held in the case of Ristine v. State, 20 Ind. 337, that a promise by the government to pay money is not an appropriation, nor does a duty on the part of the legislature to make an appropriation constitute such; nor does the promise to make an appropriation, nor the pledge of the faith of the state, nor the usage of paying money in the absence of an appropriation. There must in every case be an appropriation; that is, a direction. That is, to use the language of the Holmes Case, "the setting apart from the public revenue of a definite sum of money for the specified object in such a manner that the officials of the government are authorized to use the amount so set apart, and no more, for that object." But there is such a setting apart in the case

at bar. We have thoroughly examined and are fully conversant with the history of the law upon this subject, with the origin of the rule requiring appropriations, and with the jealousy with which the right of the legislature to control the same has been guarded; but we have yet to learn that either the English Parliament or the American legislature has ever been jealous of itself. The reason for requiring legislative appropriations is to be found in the extravagance and prodigality and favoritism of the English Kings, who, for purposes of their own, would squander the revenues, and in the desire of the Parliament to control those Kings, not merely in their expenditures, but in their intrinsic powers, by themselves controlling the purse strings of the state. In this case, however, the legislature has expressed its wish and its desire. It has specified a definite amount to be paid, and directed its payment by the proper officials and in a regular manner. It has had control of the purse strings, and it has itself loosened them. We are quite satisfied, indeed, that even in the absence of § 391 of the Code of 1905, the legislature made a valid appropriation as far as the salaries of the tax commissioners were concerned. Not only is the appropriation in our minds clearly made, but the rule applies in this case which is laid down by the supreme court of Indiana in the case of Carr v. State, 127 Ind. 209, 11 L.R.A. 370, 22 Am. St. Rep. 625, 26 N. E. 780, where the court said: "It is sufficient if the intention to make the appropriation is clearly evinced by the language employed in the statutes upon the subject, or if it is evident that no effect can possibly be given to [such] a statute unless it be construed as making the necessary appropriation." So, too, we have in North Dakota a statutory provision which is all controlling and full of suggestion. Section 101, paragraph 17, provides that "it is the duty of the state auditor to draw warrants on the state treasurer for the payment of money directed by law to be paid out of the treasury," and where such provisions are to be found the courts have, in many instances, held provisions which merely fix salaries as constituting appropriations. See Reynolds v. Taylor, 43 Ala. 420. They have, of course, been much more ready to do so in cases such as that before us, where the salary has been directed to be paid as the salaries of all other state officers, and especially where there is a general appropriation upon the statute books for the payment of the salaries of such officers. "In the case at bar, however," says the su-

preme court of Colorado in the case of People ex rel. Hegwer v. Goodykoontz, 22 Colo. 507, 45 Pac. 414, "there is no intention to make the salary of the inspector [the] subject to further legislation to be inferred from anything expressed in the act. It reads: 'Said inspector shall receive an annual salary of two thousand five hundred ($2,500) dollars and mileage at 10 cents per mile, payable the same as other officers of the state;' and by other acts then and now in force, other state officers are paid in monthly instalments at the end of each and every month, the auditor being required upon request to draw warrants upon the state treasurer for such salaries. Nothing is left indefinite and uncertain under these provisions. . . . The object of the constitutional provision inhibiting the payment of money from the state treasury, except by an appropriation made by law, etc., is to prohibit expenditures of the public funds at the mere will and caprice of the Crown or those having the funds in custody, without direct legislative sanction therefor; but no such evil need be feared, where, as in this case, the salary of the officer is fixed, together with the time and method of his payment. And we conclude that the act creating the office of state boiler inspector, and fixing his salary, when considered in connection with other statutes designating the time, mode, and manner of payment, constitutes a continuous appropriation for such salary, and that no further legislative sanction is necessary to authorize the proper officers to pay the same." See also Harrison v. Horton, 5 Cal. App. 415, 90 Pac. 716, 718. In the case of State ex rel. Noonan v. King, 108 Tenn. 271, 67 S. W. 812, the following was held to be an appropriation: "The salary of said inspector shall be $1,200 per annum, payable monthly on warrant of the comptroller, as other salaries are paid." In the case of State ex rel. Davis v. Eggers, 29 Nev. 469, 16 L.R.A.(N.S.) 630, 91 Pac. 819, the following was held to be an appropriation: "The chairman of such commission shall receive as compensation for his services, to be paid out of the treasury of the state of Nevada, the sum of $2,500 per annum, payable in equal monthly instalments upon the first day of each and every month." See also State ex rel. Brainerd v. Grimes, 7 Wash. 191, 34 Pac. 833; Shattuck v. Kincaid, 31 Or. 379, 49 Pac. 758; State ex rel. Henderson v. Burdick, 4 Wyo. 272, 24 L.R.A. 266, 33 Pac. 125.

We are thoroughly satisfied that § 391 of the Revised Codes of 1905, which provides that "there is hereby annually appropriated out of any

funds in the state treasury not otherwise appropriated, such sums as may be necessary to pay the salaries of the various state officers," is still in force, and that it has not been repealed by chapter 41 of the Session Laws of 1913. The act of 1913 is entitled: "An Act to Appropriate Money for the Expenses of the State Government and for Other Purposes; to repeal § 1737 of the Rev. Codes of 1905, as amended by chapter 1 of the Session Laws of 1911; chapter 73 of the Session Laws of 1909; and chapter 195 of the Session Laws of 1909; chapter 284 of the Session Laws of 1911, and §§ 1295 and 1298 of the Rev. Codes of 1905; § 1296 of the Rev. Codes of 1905, as amended by chapter 31 of the Session Laws of 1909, so far as the same relates to appropriations; chapter 186 of the Session Laws of 1907; §§ 1287, 1288, and 1289 of the Rev. Codes of 1905, as amended in chapter 148 of the Session Laws of 1909; chapter 175 of the Session Laws of 1911; and to repeal all acts in so far as they conflict with the provisions of this act; specifying the amount and time for which such appropriations shall be available, and providing the manner in which the appropriations herein made shall be paid." In the body of the act, appropriations are made for the elected state officers and for the various appointed officers, perhaps all with the exception of the tax commissioners. But that the act was not intended to be exclusive or to repeal § 391 of the Rev. Codes of 1905 before referred to, seems quite apparent from two considerations. The first of these is that the section is not specifically repealed. The second is that the emergency clause of the act seems to intimate that a general appropriation is merely attempted, and not necessarily thought to have been or intended to be accomplished. If the legislature of 1913 had intended to repeal § 391, it seems quite apparent that they would have done so specifically. They specifically repealed a number of other sections of the statute. Section 391 would, it seems, have been the first statute that they would have considered, as it pertained to a general appropriation, and they themselves were legislating in regard to a general appropriation. The fact that they did not repeal it specifically is full of significance. In the case of State ex rel. Henderson v. Burdick, 4 Wyo. 272, 24 L.R.A. 266, 33 Pac. 125, we have an almost identical case. In that case the statute was as follows: "The state examiner shall receive an annual salary of $2,000, and a contingent fund of not to exceed $1,400 for the incidental expenses of his office, which

same shall be paid by the treasurer of the state in the same manner as other salaries and expenses of state officers are paid." It appears from an examination of the opinion, that at one time a provision had been made for the payment of the state examiner in the general appropriation bill, but that the last legislature had omitted the public examiner from such bill. The court nevertheless granted a pre-emptory writ of mandamus, directing the auditor to issue warrants in payment of relator's claim. We are also of the opinion that whether § 391 is repealed or not, § 5 of chapter 303 of the Laws of 1911 of and in itself makes a valid appropriation for the salaries of such officers. We have followed, in short, the language of this court in the case of State ex rel. McDonald v. Holmes, 19 N. D. 286, 291, 123 N. W. 884, when it said: "From a careful consideration of the authorities on the subject and of the terms of our Constitution, we think an appropriation, in the sense that that word is used in our Constitution, is the setting apart from the public revenue of a definite sum of money for the specified object, in such a manner that the officials of the government are authorized to use the amount so set apart, and no more, for that object. . . . Generally, the fixing of a salary of a state official is held to be an appropriation." Humbert v. Dunn, 84 Cal. 57, 24 Pac. 111; Reynolds v. Taylor, 43 Ala. 420; State v. Bordelon, 6 La. Ann. 68; Nichols v. The Comptroller, 4 Stew. & P. (Ala.) 154; State ex rel. Wade v. Kenney, 10 Mont. 485, 26 Pac. 197; State ex rel. McDonald v. Holmes, 19 N. D. 286, 123 N. W. 884; Contra, State ex rel. Brown v. Weston, 6 Neb. 16; Baggett v. Dunn, 69 Cal. 75, 10 Pac. 125.

Following the same line of reasoning and of authority, we are also satisfied that chapter 303 of the Laws of 1911 not only in itself makes a definite and distinct annual appropriation of $9,000 for the salaries of the commissioners, but definite and distinct annual appropriations of $2,400 for the salary of their secretary, $6,000 for clerks, stenographers, and experts, $4,500 for office supplies and traveling expenses, and $3,000 for miscellaneous expenses, such as witness fees, officers' fees in serving summonses and subpœnas, and the cost of depositions. We find, indeed, such an overwhelming weight of authority, of reason, and of sound public policy in favor of petitioners' position, that we can entertain no doubt in relation thereto. It is, of course, well established

that a mere promise to pay does not in itself make an appropriation. Ristine v. State, 20 Ind. 328; State ex rel. Board of Comrs. v. Ristine, 20 Ind. 345; Newell v. People, 7 N. Y. 9; Sunbury & E. R. Co. v. Cooper, 33 Pa. 278. There is a wide distinction, however, between a promise on the part of a state to pay a third party, and the fixing of definite amounts as salaries and other expenses to be paid, and a direction to its disbursing and auditing officer to pay them *so that the machinery of government may continue to be operated.* "It does not . . . follow that because no claim can be enforced where there is no appropriation, the appropriation must be made in a particular form or in express terms. It is sufficient if the intention to make the appropriation is clearly evinced by the language employed in the statutes upon the subject, *or if it is evident that no effect* can possibly be given to a statute unless it be construed as making the necessary appropriation." Carr v. State, 127 Ind. 204, 11 L.R.A. 370, 22 Am. St. Rep. 624, 628, 26 N. E. 778. "A direction to the officers to pay money out of the treasury upon a given claim, or for a given object, may, by implication, include in the direction an appropriation." Ristine v. State, and Carr v. State, supra. "If the salary of a public officer is fixed, and the time of payment prescribed by law, no special annual appropriation is necessary to authorize the auditor to issue his warrant for its payment." Reynolds v. Taylor, 43 Ala. 420; Nichols v. The Comptroller, 4 Stew. & P. (Ala.) 154; Thomas v. Owens, 4 Md. 189; Green v. Purnell, 12 Md. 329; State ex rel. Buck v. Hickman, 10 Mont. 497, 26 Pac. 386; State ex rel. Roberts v. Weston, 4 Neb. 216; Carr v. State, 127 Ind. 204, 11 L.R.A. 370, 22 Am. St. Rep. 624, 629, 26 N. E. 778. "Under our system of government," says the supreme court of Maryland in the case of Thomas v. Owens, 4 Md. 189, 225, "its powers are wisely distributed to different departments; each and all are subordinate to the Constitution, which creates and defines their limits; whatever it commands is the supreme and uncontrollable law of the land. This is not denied *directly,* although it is inferentially, substantially, and *practically.* It is said that inasmuch as the 20th section of the 3d article of the Constitution declares, 'No money shall be drawn from the treasury of the state, except in accordance with an appropriation made *by law*' that an *act of Assembly* must precede the withdrawal, and inasmuch as none such has been passed covering the period antecedent to the 1st

of January, 1852, there is, therefore, no appropriation, *by law* for that time. To this reasoning we cannot yield our consent. In the construction of any instrument the whole paper ought to be considered, *that the will of its framers may be truly and accurately ascertained;* the objects contemplated and the purposes to be subserved should be constantly kept in view, *and the language used interpreted in reference to the manifest intent.* Now what could have been the purpose of the clause in the Constitution to which we have referred? It was obviously inserted to prevent the expenditure of the people's treasure *without their consent,* either as expressed by themselves in the organic law, or by their representatives in constitutional acts of legislation. To use the language of Justice Story (Vol. 3, Contr. § 1342), its purpose 'is to secure *regularity, punctuality,* and *fidelity* in the disbursements of the public money;' and, as said by Judge Tucker in his commentaries (1 Tucker's Bl. Com. Appx. 362): 'All the expenses of government being paid by the people, it is the right of the *people,* not only not to be taxed without their *own consent,* or that of their representatives freely chosen, but also to be actually *consulted* upon the disposal of the money.' Such a provision, says the same learned writer, 'forms a salutary check, not only upon the extravagance and profusion in which the executive department might indulge itself, and its adherents and dependents; but also against any misappropriation which a rapacious, ambitious, or otherwise unfaithful executive might be disposed to make. In those governments where the people are taxed by the executive, no such check can be interposed. The prince levies whatever sums he thinks proper; disposes of them as he thinks proper; and would deem it sedition against him and his government if any account were required of him, in what manner he had disposed of any part of them. Such is the difference between governments where there is responsibility and where there is none.' These being the purposes and objects of the clause, the question is: *Have the people given their consent to the payment of the salary of the Comptroller?* That they have done so is palpably manifest. They have said, he 'shall receive an annual salary of $2,500.' They have not merely said he may *claim* such a sum, but, emphatically, that he 'shall *receive*' it. It is impossible for human language to be less ambiguous or more positive. The people, in their organic law—which is paramount to all other law—have not only given

their *consent,* but they have imperatively issued their commands, that the particular officer *'shall receive'* it. How is their will obeyed, if it be within the power of the treasurer, or anyone else, to withhold it from caprice, unfaithfulness to duty, or from mistaken judgment? To allow of such a power in that officer would be to put him above the Constitution, whose creature he is. It would be to invest him with authority to annul the sovereign will; in fact, to stop the wheels of government and reduce things into the wildest confusion. The Constitution has said the officer *'shall receive'* his salary, and this *fiat* of the supreme will is not to be nullified by the mere *ipse dixit* of a mere *ministerial* officer; for such, and none other, is the treasurer." In this statement is to be found the whole gist of the question, and the arguments therein adduced and the conclusions to be derived therefrom, are, in our minds, unanswerable. It is true that the opinion is an old one, but it has borne the scrutiny of sixty years, has been cited with approval over and over again, and has been but rarely criticized. It is true that in the Maryland case quoted from, the salaries of the officers were fixed by the Constitution, but this makes no difference. Under the American system of government the entire sovereignty of the people is vested in the legislature, and that sovereignty is supreme except as controlled by the state or Federal Constitutions. The state and Federal Constitutions contain no limitations in the matters before us, and we have therefore the sovereign people speaking through the voice of the legislature. It is not for this court or for any other officer to disobey their command. See State ex rel. Henderson v. Burdick, 4 Wyo. 272, 24 L.R.A. 266, 33 Pac. 125, 127.

We, of course, realize that the cases cited are opposed to the ruling in Myers v. English, 9 Cal. 341, and State ex rel. Brown v. Weston, 6 Neb. 16. We are, however, also aware of the fact that these cases have not been generally followed, and are opposed to the weight of authority. See Humbert v. Dunn, 84 Cal. 57, 24 Pac. 111. We also believe that their reasoning is untenable, as it fails entirely to recognize the fact that it was the royal and executive expenditures and extravagances that the constitutional provisions sought to check and to prevent, and not the exercise of the sovereign power of the legislative assembly or of the people whom these legislative assemblies represented. We are aware of the opinion in People ex rel. Richardson v. Spruance,

8 Colo. 530, 9 Pac. 628. The facts of that case, however, are materially different from those in the case at bar, and even if the opinion is in conflict with the ideas which we herein express, that opinion has been modified, if not overruled, by Mullen v. McKim, 22 Colo. 468, 45 Pac. 416. We are also aware of the case of Leddy v. Cornell, 52 Colo. 189, 38 L.R.A.(N.S.) 918, 120 Pac. 153, Ann. Cas. 1913C, 1304, which holds that a provision providing for the appointment of a secretary who shall be paid a salary not to exceed $1,800 a year and his necessary traveling expenses does not constitute a continuous appropriation, as the amount is not definitely fixed. The case, however, is not a well-considered case, and the point under discussion is merely brushed aside. The distinction made is at any rate too technical for us to follow. In the statute before us the limits of the expenditures, both for the salary of the secretary and the expenses of operating the commission, are definitely fixed; and this, we think, is sufficient. It has been the constant practice in this state to appropriate "not to exceed" certain amounts, or certain amounts, "or so much thereof as may be necessary," and for us to follow the Colorado case last cited would be not only to invalidate many useful appropriations, but to prevent all economy in administration. It would tend to maximum appropriations and the reaching of this limit and maximum by those intrusted with the disbursements of the funds and the management of the various state institutions and departments, no matter whether the services or supplies could be had or purchased at a smaller sum or the needs of the institutions or departments actually required the full expenditure or not. So, too, as pointed out in the case of State ex rel. Henderson v. Burdick, supra, the decisions of the California courts on the subject of appropriations have been entirely inconsistent, and lose much of their authority by their absolute irreconcilability. See also note to Carr v. State, 127 Ind. 204, 11 L.R.A. 370, 26 N. E. 778, which is found in 22 Am. St. Rep. 628. In the Burdick Case, indeed, the supreme court of Wyoming, after thoroughly reviewing the decisions of the supreme court of California, as well as those of other states, held that an act which provided that "the state examiner shall receive an annual salary of $2,000, and a contingent fund of not to exceed $1,400, for the incidental expenses of his offices, which same shall be paid by the treasurer of the state in the same manner as other salaries and expenses

of state officers are paid," operated as an appropriation act, and did not require any other legislation or a special appropriation at each regular session of the legislature to keep it alive. The opinion is a well-considered one, and is well worthy of our consideration.

We are also aware of the case of State ex rel. Norfolk Beet-Sugar Co. v. Moore, 50 Neb. 88, 61 Am. St. Rep. 538, 69 N. W. 373. In that case, however, there was no certainty either as to the expenditure or as to the limits to the fund or attempted appropriation. Where such certainty has existed the Nebraska courts have in several cases held that appropriations have been made. See Re Groff, 21 Neb. 647, 59 Am. Rep. 859, 33 N. W. 426; State ex rel. Lanham v. Babcock, 24 Neb. 787, 40 N. W. 316; State ex rel. Sayre v. Moore, 40 Neb. 854, 25 L.R.A. 774, 59 N. W. 755.

But respondent claims that the appropriation of $3,000 contained in § 14 of chapter 303 of the Laws of 1911 is all-conclusive and was intended to be the sole and only appropriation until some future legislature should see fit to increase it. He argues that the legislature of 1911, from a sense of economy, and on account of the financial condition of the state, wished to confine the appropriations for the tax commission to that amount, and cites in support of his proposition the emergency clause (§ 15), which provides that, "whereas the finances of the state will not warrant the full expenses to be incurred herein, it is hereby provided that this act shall take effect July 1, 1912, and that the appointments shall not be made until July 1, 1912, the same to be thereafter confirmed by the senate in the legislative session of 1913." His argument, however, goes too far. It is quite clear that the legislature did intend to save money. It provided a means to do this, however, in its postponement of the taking effect of the law until July 1, 1912. This is all the saving that we can believe it intended to make. It provided in unequivocable terms for the commission, and outlined its work and its duties, among which was to make a report to the legislature at its biennial sessions. It provided that the act should take effect on July 1, 1912, and six months before the legislative session of 1913 was to commence. The total annual expenditure provided by the act was $24,900. The proportionate cost of running the commission for these six months would be $12,450. It is absurd to concede or believe that the legislature only intended to appropriate $1,500 for this pur-

pose. If, indeed, it intended to save any more than the cost of operating the commission for the eighteen months during which its creation was postponed, why did it not postpone the whole matter, and the making of all appropriations, and the creation of the commission, until the next general session of the legislature? We must assume that it intended that the commissioners should be appointed on July 1, 1912, and be prepared to make a report of their work to the legislature in 1913. We cannot assume that our legislative bodies are playing with government and creating commissions that they do not intend to support, or do not intend to be punctually appointed.

It is also claimed by counsel for respondent that this court can and should scrutinize the history of the passage of the law of 1911, and that a perusal of the records will show and the legislative journals disclose the fact that when the bill was first introduced it provided for an appropriation of $19,500, in place of the $3,000 now contained in § 14. It is argued that the amendment of this section so as to read $3,000 instead of $19,500, clearly shows that the legislature intended that $3,000 was all that should be appropriated. We do not, however, draw such an inference from the facts. It, on the other hand, is quite apparent to us that when the bill was scrutinized by the committee it was discovered that definite appropriations were made in §§ 5, 6, 7, and 8 of the act for the greater part of the expenses incidental to the maintenance of the commission, and that such being the case $19,500 would be too much, and that the section was therefore amended and the amount reduced to $3,000, which sum was provided to cover incidental expenses, such as witness fees, fees of officers in serving summons and subpœnas, and which expenses were not expressly provided for in the other sections of the act. If any presumptions are to be made, they must be made in favor of the act, and not against it. Of all the presumptions the strongest is that our legislators are serious-minded men, and are not trifling with politics or with government. The presumption therefore follows that they did not intend to create a commission and then to strangle it by failing to provide for its maintenance.

Respondent further contends that there is no tax commission at all, and therefore no need of any appropriation or of any action on the part of the state auditor. He states that § 2 of the act provides that "said tax commission shall be composed of three commissioners, who shall be

appointed by the governor by and with the advice and consent of the senate. Of such three persons, one shall be appointed and designated to serve for a term ending on the first Monday in May, 1915, one for a term ending on the first Monday in May, 1917, and one for a term ending on the first Monday in May, 1919, each of said terms to begin upon the qualification of the person appointed therefor. Upon the expiration of the terms of the three commissioners first to be appointed as aforesaid, each successive commissioner shall be appointed and hold his office for the term of six years, except in case of a vacancy as hereinafter provided, and such commissioner shall hold his office until his successor shall have been appointed and qualified; while § 3 provides that "after the appointment of said first three commissioners, and except when appointed to fill a vacancy, each commissioner shall be appointed on or before the last Monday in January, during the biennial session of the legislature, next preceding the commencement of the term for which he shall be appointed. In case of vacancy, it shall be filled by appointment by the governor for the unexpired portion of the term in which such vacancy shall occur, subject to confirmation by the senate. If such appointment be made when the legislature is not in regular session, the appointee shall hold his office until the third Monday in January in the next biennial session of the legislature, when if such appointment is not confirmed by the senate, the office shall become vacant, and, on or before the last Monday in February, the governor, by and with the advice and consent of the senate, shall appoint a suitable person to fill such vacancy for the remainder of such term." Counsel states, and the record shows, that the present commissioners were appointed on the 1st of July, A. D., 1912, and that they were not confirmed by the senate until the afternoon of January 20th, that being the third Monday in the month. He argues that the confirmation was too late, and that such confirmation should have been made prior to the Monday in question.

Counsel for respondent, however, is in error in assuming that the word "until" usually excludes the last day. It is well established by the authorities that the word " 'until' may either, in a contract or a law, have an inclusive or exclusive meaning, according to the subject to which it is applied, the nature of the transaction which it specifies, and the connection in which it is used." (8 Words & Phrases, 7217, 7218.) And the authorities are numerous that it may be held to include the day

to which it is prefixed. Such, indeed, is the almost universal rule where the word is used with reference to a future day on which something is required to be done. Re Croft, 14 W. N. C. 437; Bunce v. Reed, 16 Barb. 347, 352; Dakins v. Wagner, 3 Dowl. P. C. 535; Hahn v. Dierkes, 37 Mo. 574; Penn Placer Min. Co. v. Schreiner, 14 Mont. 121, 35 Pac. 878; Gottlieb v. Fred W. Wolf Co. 75 Md. 126, 23 Atl. 198; Glynn County Academy v. Dart, 67 Ga. 765; Louisville & N. R. Co. v. Turner, 81 Ky. 489; Newport News & M. Valley R. Co. v. Thomas, 96 Ky. 613, 29 S. W. 437; Conway v. Smith Mercantile Co. 6 Wyo. 327, 49 L.R.A. 201, 44 Pac. 940; St. Louis & S. F. R. Co. v. Gracy, 126 Mo. 472, 28 S. W. 736, 29 S. W. 579, 580; State v. Mosley, 116 Mo. 545, 22 S. W. 804; Houghwout v. Boisaubin, 18 N. J. Eq. 315, 318; Barker v. Keith, 11 Minn. 65, 67, Gil. 37, 40; Clarke v. New York, 111 N. Y. 621, 19 N. E. 436; Rogers v. Cherokee Iron & R. Co. 70 Ga. 717; Consolidated Kansas City Smelting & Ref. Co. v. Peterson, 8 Kan. App. 316, 55 Pac. 673; Kendall v. Kingsley, 120 Mass. 94, 95; Ryan v. State Bank, 10 Neb. 524, 7 N. W. 276. Even the few authorities which, under the state of facts presented, hold that the word "until" is exclusive, and not inclusive, hold that "this word 'until,' whether found in a contract or in a statute, is the same, and in either case [its meaning] must depend upon the intention of those using it, as manifested by the context, and considered with reference to the subject to which it relates." See Ryan v. State Bank, 10 Neb. 524, 7 N. W. 276–278; People ex rel. Cornell S. B. Co. v. Hornbeck, 30 Misc. 212, 61 N. Y. Supp. 978; Croco v. Hille, 66 Kan. 512, 72 Pac. 208; Webster v. French, 12 Ill. 302, 303. It is to be noted that in the section under consideration, the statute provides that "the appointee shall hold his office until the third Monday in January in the next biennial session of the legislature, *when* if such appointment is not confirmed by the senate, the office *shall become vacant,* etc." The use of the word "when," clearly signifies an intention that something shall be done on the first Monday in January, and its use in the statute has an important bearing upon the interpretation of the word "until." The words, "shall become vacant," are also future in their form, and clearly indicate that no vacancy was presumed until after failure to confirm on the Monday in question. It is quite clear to us that the legislative intention was that the appointees should hold their offices until the third Monday in

January, when the matter of their confirmation should be taken up, and that if they were not confirmed on or before that day that then the office should be vacant. Counsel for respondent, we know, says: "No person would long fail to distinguish the difference in meaning of the terms, 'until next Monday,' and 'on or before next Monday.' One man says to another: 'I rent you my house until the 1st day of May;' would anyone say that the tenancy did not expire on the 30th day of April? If he should say, 'I rent you my house until the 1st day of May, when I shall move into it myself,' no one would say that 'when' referred to anything other than the 1st day of May, and the use of the word 'when' only makes it more definite and certain that the tenancy ended on April 30th, and that the landlord would occupy it on the following day." In this argument, however, he concedes the whole question. He admits that the words, "when I shall move into it myself," fixed the time when the landlord might enter. Our legislature prescribes the time when the legislature shall formally pass upon the matter of confirmation, and that is the third Monday in January. The trouble with his illustration is that the tenancy is, by the terms of the agreement, definitely limited and terminated; while under the statute in question there is no termination of the right to the office unless the legislature shall fail to confirm the same. If the legislature intended that the office should become vacant before the third Monday in January, on which day the confirmation or nonconfirmation was provided for, why did they not use the words, "when if such appointment *shall not have been* confirmed," and not use the words that they did, "when, if such appointment is not confirmed." It is perfectly clear from the authorities that the words "when" and "is" and "become," in such a context, have a future, and not a past or present, meaning. See Hammond v. Buchanan, 68 Ga. 728–731; Providence & W. R. Co. v. Yonkers F. Ins. Co. 10 R. I. 74–77; Re Birdsall, 22 Misc. 180, 49 N. Y. Supp. 450, 463; Wilkinson v. Winne, 15 Minn. 159, 166, Gil. 123; Kirtz v. Peck, 113 N. Y. 222, 21 N. E. 130, 131; Quanah v. White, 88 Tex. 14, 28 S. W. 1065–1067; Hening v. Nelson, 20 Ga. 583, 584. See also Webster's Dict.

But there is another and more controlling reason for holding that the commission was and still is in existence, and that is, that there was no necessity for any confirmation by the legislature, either prior to or upon the third Monday of January, but that under the statute the

commission could be confirmed at any time during the legislative session. A reading of §§ 2 and 3 of the act will, we believe, make it clear to anyone that the confirmation to be made on the third Monday in January related merely to commissioners who had been appointed to fill vacancies, and after the appointment of the first three commissioners provided for in § 2 of the act. It is also quite clear from § 15 of the act that, as far as the commissioners first appointed were concerned, the legislature of 1913 had the whole of the session in which to act upon the confirmation. Section 1 of the act provides that "there is hereby created a state board to be designated and known as the tax commission." Section 2 of the act provides that "said tax commission shall be composed of three commissioners, who shall be appointed by the governor by and with the consent of the senate. Of such three persons, one shall be appointed and designated to serve for a term ending on the first Monday in May, 1915, one for a term ending on the first Monday in May, 1917, and one for a term ending on the first Monday in May, 1919, each of said terms to begin upon the qualification of the person appointed therefor;" while § 15 provides that "this act shall take effect July 1, 1912, and that the appointments shall not be made until after July 1, 1912, the same to be thereafter confirmed by the senate *in the legislative session of 1913.*" These are the clauses which relate to the original commissioners. The section (§ 3), on which respondent relies, relates only to vacancies occurring after the appointment of the first three commissioners and to future appointments. It provides: "*After the appointment of said first three commissioners, and except when appointed to fill a vacancy,* each commissioner shall be appointed on or before the last Monday in January, during the biennial session of the legislature next preceding the commencement of the term for which he shall be appointed. *In case of a vacancy,* it shall be filled by appointment by the governor for the unexpired portion of the term in which such vacancy shall occur, subject to confirmation by the senate. If *such* appointment be made when the legislature is not in regular session, the appointee shall hold his office until the third Monday in January in the next biennial session of the legislature, when if *such* appointment is not confirmed by the senate, the office shall become vacant." The word "such," which precedes the word "appointment," must refer back to the appointment made *in case of vacancy.* There is no other way in

which the section can be read without doing violence to all rules of construction and to the plain meaning of the English used by the legislature. There were no appointments to fill vacancies to be confirmed by the legislature of 1913, nor were there any "unexpired terms" to be filled. The only matter before the senate of 1913 was the confirmation of the appointments of the original commissioners, which § 15 provided could be confirmed "by the senate in the legislative session of 1913." This is certainly the construction that the legislature of 1913 gave to the act, and in our minds is the only logical construction of which it is capable.

The peremptory writ will issue as prayed for.

ARTHUR NESS v. GREAT NORTHERN RAILWAY COMPANY, a Corporation.

(142 N. W. 165.)

Railroads — helper — pleading — defective apparatus — negligence.

1. Plaintiff, while in defendant's employ as a helper in its shops at Devils Lake, met with an accident while assisting a machinist in forcing a bushing into a link by means of an air press. The injury was caused on account of certain blocking giving away, resulting in the link falling from the press table onto plaintiff's foot. The complaint charges negligence on defendant's part, first, in furnishing a defective air press; and, second, in furnishing unsuitable and defective blocking irons for the safe operation of said press.

Evidence examined, and *held* insufficient to authorize a submission to the jury of the question of defendant's negligence on either of the alleged grounds.

Master — servant — defective apparatus — knowledge of servant — recovery.

2. Both plaintiff and the machinist with whom he was engaged as a helper admit that there were no imperfections to their knowledge, either in the machinery or appliances in use by them at the time of the accident; and the proof also shows that there were a lot of pieces of iron near at hand suitable for blockings from which they were at liberty to make a selection. The blocking irons used had been in use for such purpose for a long time prior to the accident; and plaintiff and the machinist knew, or should have known, as much or more about their condition as the master. *Held*, in the light of such facts, that no recovery can be had, even though the irons used for blocking were not the most suitable for such purpose.

Evidence — negligence — insufficiency — recovery — cause of injury.

3. Evidence, as to the alleged defect in the air press on account of certain play or looseness at the points where such press was fastened by bolts to side arms and to the table, examined and *held* insufficient upon which to base a recovery, it being apparent that such alleged defect could in no manner have caused the plaintiff's injury.

Opinion filed May 1, 1913. Rehearing denied June 18, 1913.

Appeal from District Court, Ramsey County, *C. W. Buttz,* J.

From a judgment in plaintiff's favor, and from an order denying a motion for a new trial, defendant appeals.

Reversed with directions.

Murphy & Duggan, for appellant.

The burden was upon plaintiff to establish that the defendant failed to use ordinary care to have on hand a supply of suitable blocking. Cregan v. Marston, 126 N. Y. 568, 22 Am. St. Rep. 854, 27 N. E. 952.

The master cannot be held liable for injuries sustained from the use of defective material by the servant, when there was sufficient suitable and sound material on hand from which the servant might choose. Thyng v. Fitchburg R. Co. 156 Mass. 13, 32 Am. St. Rep. 425, 30 N. E. 169; Prescott v. Ball Engine Co. 176 Pa. 459, 53 Am. St. Rep. 683, 35 Atl. 224; Webber v. Piper, 109 N. Y. 496, 17 N. E. 216; Harley v. Buffalo Car Mfg. Co. 142 N. Y. 31, 36 N. E. 813; Kaare v. Troy Steel & I. Co. 139 N. Y. 369, 34 N. E. 901; Ross v. Walker, 139 Pa. 42, 23 Am. St. Rep. 160, 21 Atl. 157, 159; Kehoe v. Allen, 92 Mich. 464, 31 Am. St. Rep. 608, 52 N. W. 740; Hefferen v. Northern P. R. Co. 45 Minn. 471, 48 N. W. 1, 526, 16 Am. Neg. Cas. 254; Louisville, N. O. & T. R. Co. v. Petty, 67 Miss. 255, 19 Am. St. Rep. 304, 7 So. 351; Moran v. Brown, 27 Mo. App. 487; Cleveland, C. C. & St. L. R. Co. v. Brown, 20 C. C. A. 147, 34 U. S. App. 759, 73 Fed. 970; Allen v. Great Western & Ft. S. Iron Co. 160 Mass. 557, 36 N. E. 581.

Where the master has supplied an adequate and accessible stock of suitable appliances from which to make selection, and the imperfection of an instrumentality selected is or ought to have been apparent to the servant who selected it, the master cannot be held liable. 2 Labatt, Mast. & S. § 603, citing cases; 2 Labatt, Mast. & S. § 621, and cases

cited; Toohey v. Equitable Gas Co. 179 Pa. 437, 36 Atl. 314, 1 Am. Neg. Rep. 185; Ling v. St. Paul, M. & M. R. Co. 50 Minn. 160, 52 N. W. 378; Campbell v. New Jersey Dry Dock & Transp. Co. 61 N. J. L. 382, 39 Atl. 658, 4 Am. Neg. Rep. 191; Maloney v. United States Rubber Co. 169 Mass. 347, 47 N. E. 1012; Ellsbury v. New York, N. H. & H. R. Co. 172 Mass. 130, 70 Am. St. Rep. 248, 51 N. E. 415.

Opinion evidence cannot be presented to the jury when the facts in the case can be presented in such manner that jurors of ordinary intelligence and experience in the affairs of life can understand and duly appreciate them. Meehan v. Great Northern R. Co. 13 N. D. 440, 101 N. W. 183; Ferguson v. Hubbell, 97 N. Y. 507, 49 Am. Rep. 544; Muldowney v. Illinois C. R. Co. 36 Iowa, 462; Bemis v. Central Vermont R. Co. 58 Vt. 636, 3 Atl. 531; Ouverson v. Grafton, 5 N. D. 281, 65 N. W. 676.

It is the duty of the master to use ordinary care in his efforts to supply suitable apparatus with which his servant is to work. His duty is not measured by the *actual condition* of the apparatus, but by the *care he exercised,* in its selection. Louisville & N. R. Co. v. Mounce, 24 Ky. L. Rep. 1378, 71 S. W. 518.

The master is not an insurer. Lang v. Bailes, 19 N. D. 582, 125 N. W. 892.

It is the master's duty to exercise reasonable care in his efforts to provide a safe place in which his servant is to labor, and in furnishing apparatus with which he is to work. Hughley v. Wabasha, 69 Minn. 245, 72 N. W. 78; Cudahy Packing Co. v. Roy, 71 Neb. 600, 99 N. W. 231; International & G. N. R. Co. v. Bell, 75 Tex. 50, 12 S. W. 321; Lincoln Street R. Co. v. Cox, 48 Neb. 807, 67 N. W. 740; F. C. Austin Mfg. Co. v. Johnson, 32 C. C. A. 309, 60 U. S. App. 661, 89 Fed. 677; Chicago, B. & Q. R. Co. v. Oyster, 58 Neb. 1, 78 N. W. 359; Gulf, C. & S. F. R. Co. v. Beall, — Tex. Civ. App. —, 43 S. W. 606; Armour & Co. v. Russell, 6 L.R.A.(N.S.) 602, 75 C. C. A. 416, 144 Fed. 614; Chicago & E. I. R. Co. v. Garner, 78 Ill. App. 281; Belleville Pump & S. Works v. Bender, 69 Ill. App. 189; Lancaster Cotton Oil Co. v. White, 32 Tex. Civ. App. 608, 75 S. W. 339.

The vice of an erroneous charge upon the law is not cured by a later correct statement of the law. The jury does not know which one is

correct, and invariably the one most favorable to plaintiff, in such cases, is adopted by the jury, and prejudice to defendant is presumed. Armour & Co. v. Russell, 6 L.R.A.(N.S.) 602, 75 C. C. A. 416, 144 Fed. 614; Lincoln Street R. Co. v. Cox, 48 Neb. 807, 67 N. W. 740; F. C. Austin Mfg. Co. v. Johnson, 32 C. C. A. 309, 60 U. S. App. 661, 89 Fed. 677; State v. Kruse, 19 N. D. 207, 124 N. W. 385; First Nat. Bank v. Lowrey Bros. 36 Neb. 290, 54 N. W. 568; Bryant v. Modern Woodmen, 86 Neb. 372, 27 L.R.A.(N.S.) 326, 125 N. W. 621, 21 Ann. Cas. 365; Barr v. State, 45 Neb. 458, 63 N. W. 856.

There was error in the taxation of costs, or witnesses' fees. Such fees are prescribed by statute, and are only allowed for attendance before the court. Rev. Codes 1905, § 2615.

Constructive presence of witnesses is not sufficient. 30 Am. & Eng. Enc. Law, 1178; McArthur v. State, 41 Tex. Crim. Rep. 635, 57 S. W. 847; The Michigan, 52 Fed. 509; State v. Willis, 79 Iowa, 326, 44 N. W. 699.

Fredrick T. Cuthbert and *Arthur R. Smythe,* for respondent.

The master must use ordinary and reasonable care not to subject his servant to unreasonable or extraordinary dangers by sending him to work on dangerous machines or with dangerous tools and appliances. Thomp. Neg. §§ 3786–3794.

The master must inspect the place and the appliances, and he is chargeable with knowledge of what a reasonable inspection would disclose. St. Louis, I. M. & S. R. Co. v. Harper, 44 Ark. 524; Van Dusen v. Letellier, 78 Mich. 492, 44 N. W. 572; Siemsen v. Oakland, S. L. & H. Electric R. Co. 134 Cal. 494, 66 Pac. 672; Eaton v. New York C. & H. R. R. Co. 163 N. Y. 391, 79 Am. St. Rep. 600, 57 N. E. 609, 8 Am. Neg. Rep. 103; Nord Deutscher Lloyd S. S. Co. v. Ingebregsten, 57 N. J. L. 402, 51 Am. St. Rep. 604, 31 Atl. 619, 16 Am. Neg. Cas. 673; Tedford v. Los Angeles Electric Co. 134 Cal. 76, 54 L.R.A. 85, 66 Pac. 76; Walkowski v. Penokee & G. Consol. Mines, 115 Mich. 629, 41 L.R.A. 33, 73 N. W. 895.

He is also obliged to repair and to keep in a reasonably safe condition machinery used by his servants. Higgins v. Williams, 114 Cal. 176, 45 Pac. 1041; Beeson v. Green Mountain Gold Min. Co. 57 Cal. 20, 13 Am. Neg. Cas. 461; Elledge v. National City & O. R. Co. 100 Cal. 282, 38 Am. St. Rep. 291, 34 Pac. 720; Lehigh Valley Coal Co.

v. Warrek, 28 C. C. A. 540, 55 U. S. App. 437, 84 Fed. 866; Bailey v. Rome, W. & O. R. Co. 139 N. Y. 302, 34 N. E. 918; Moynihan v. Hills Co. 146 Mass. 586, 4 Am. St. Rep. 348, 16 N. E. 574, 15 Am. Neg. Cas. 602; Houston & T. C. R. Co. v. Dunham, 49 Tex. 181; Carter v. Oliver Oil Co. 34 S. C. 211, 27 Am. St. Rep. 815, 13 S. E. 419; Jones v. Phillips, 39 Ark. 26, 43 Am. Rep. 264, 13 Am. Neg. Cas. 291; Gillenwater v. Madison & I. R. Co. 5 Ind. 339, 61 Am. Dec. 101; Wells v. Coe, 9 Colo. 159, 11 Pac. 50, 13 Am. Neg. Cas. 587; Houston & T. C. R. Co. v. Marcelles, 59 Tex. 334; Rice v. King Philip Mills, 144 Mass. 237, 59 Am. Rep. 80, 11 N. E. 101.

Lund was in defendant's employ. He was doing his work in the ordinary and recognized manner, and was not negligent. But, if he was negligent, the defendant would still be liable where Lund's negligence commingled with the unsafe and defective machinery to cause the injury. Rev. Codes 1905, § 4400, 7 Thomp. Neg. § 4858; Cudahy Packing Co. v. Anthes, 54 C. C. A. 504, 117 Fed. 118; Colley v. Southern Cotton Oil Co. 120 Ga. 258, 47 S. E. 932; Southern Bauxite Min. & Mfg. Co. v. Fuller, 116 Ga. 695, 43 S. E. 64; Chicago, W. & V. Coal Co. v. Moran, 210 Ill. 9, 71 N. E. 38; American Tin-Plate Co. v. Williams, 30 Ind. App. 46, 65 N. E. 304; Buehner v. Creamery Package Mfg. Co. 124 Iowa, 445, 104 Am. St. Rep. 354, 100 N. W. 345; Tradewater Coal Co. v. Johnson, 24 Ky. L. Rep. 1777, 61 L.R.A. 161, 72 S. W. 274; McGinn v. McCormick, 109 La. 396, 33 So. 382; Missouri, K. & T. R. Co. v. Hutchens, 35 Tex. Civ. App. 343, 80 S. W. 415; Czarecki v. Seattle & S. F. R. & Nav. Co. 30 Wash. 288, 70 Pac. 750; Grant v. Keystone Lumber Co. 119 Wis. 229, 100 Am. St. Rep. 883, 96 N. W. 535; Ruemmeli-Braun Co. v. Cahill, 14 Okla. 422, 79 Pac. 260.

On defendant's motion for a directed verdict, the trial court and the Supreme Court will assume the evidence of plaintiff undisputed, and will give to it the most favorable construction. Northern P. R. Co. v. Vidal, 106 C. C. A. 661, 184 Fed. 707; Bohl v. Dell Rapids, 15 S. D. 619, 91 N. W. 315; Marshall v. Harney Peak Tin Min. Mill & Mfg. Co. 1 S. D. 350, 47 N. W. 290; Merchants' Nat. Bank v. Stebbins, 15 S. D. 280, 89 N. W. 674; Sanford v. Duluth & D. Elevator Co. 2 N. D. 10, 48 N. W. 434; Spokane Grain Co. v. Great Northern Exp. Co. 55 Wash. 545, 104 Pac. 794; Roe v. Standard Furniture Co. 41 Wash.

546, 83 Pac. 1109; Illinois C. R. Co. v. Futrell, 141 Ky. 847, 133 S. W. 983.

A verdict on conflicting evidence will not be reviewed or disturbed by the appellate court on appeal. Klein v. Atchison, T. & S. F. R. Co. 12 Cal. App. 285, 107 Pac. 147; Rio Grande Western R. Co. v. Boyd, 44 Colo. 119, 96 Pac. 781; Murphy v. Southern P. Co. 31 Nev. 120, 101 Pac. 322, 21 Ann. Cas. 502; Chicago, R. I. & P. R. Co. v. Mashore, 21 Okla. 275, 96 Pac. 630, 77 Ann. Cas. 277; Tacoma v. Bonnell, 58 Wash. 593, 109 Pac. 60; Chicago City R. Co. v. McClain, 211 Ill. 589, 71 N. E. 1103; Nortonsville Coal Co. v. Whited, — Ky. —, 124 S. W. 397; Pittsburg, C. C. & St. L. R. Co. v. Blum, — Ky. —, 125 S. W. 300; Parker v. United R. Co. 154 Mo. App. 126, 133 S. W. 137; Texas & P. R. Co. v. Dominguez, — Tex. Civ. App. —, 135 S. W. 681; Buel v. Chicago, R. I. & P. R. Co. 81 Neb. 430, 116 N. W. 299; Rathjen v. Chicago, B. & Q. R. Co. 85 Neb. 808, 124 N. W. 473; Kirkpatrick v. Aetna L. Ins. Co. 141 Iowa, 74, 22 L.R.A.(N.S.) 1255, 117 N. W. 1111; Nilson v. Horton, 19 N. D. 187, 123 N. W. 397; Lowry v. Piper, 20 N. D. 637, 127 N. W. 1046.

On appeal from a judgment rendered on a general verdict the courts will give to the evidence of plaintiff all the legitimate and reasonable inferences that the jury might deduce therefrom. Chicago Terminal Transfer R. Co. v. Vandenberg, 164 Ind. 470, 73 N. E. 990, 18 Am. Neg. Rep. 36; Lunde v. Cudahy Packing Co. 139 Iowa, 688, 117 N. W. 1063; Sheppard v. Wichita Ice & Cold Storage Co. 82 Kan. 509, 28 L.R.A.(N.S.) 648, 108 Pac. 819; Hartzler v. Metropolitan Street R. Co. 140 Mo. App. 665, 126 S. W. 760; Louisville & N. R. Co. v. Eckman, 137 Ky. 331, 125 S. W. 729.

The condition of the machinery and appliances at the time of the injury is a proper subject for expert testimony. Thomp. Neg. §§ 7751, 7752; Schweikert v. John R. Davis Lumber Co. 145 Wis. 632, 130 N. W. 508; Erickson v. American Steel & Wire Co. 193 Mass. 119, 78 N. E. 761; Murphy v. Marston Coal Co. 183 Mass. 385, 67 N. E. 342; Dardanelle Pontoon Bridge & Turnpike Co. v. Croom, 95 Ark. 284, 30 L.R.A.(N.S.) 360, 129 S. W. 280; Zarnik v. C. Reiss Coal Co. 133 Wis. 290, 113 N. W. 752; Craig v. Benedictine Sisters Hospital Asso. 88 Minn. 535, 93 N. W. 669; Anderson v. Fielding, 92 Minn. 42, 104 Am. St. Rep. 665, 99 N. W. 357, 16 Am. Neg. Rep. 92.

It is the duty of the master to furnish safe and suitable materials for the use of the servant, and to keep them in repair and order. Northern P. R. Co. v. Herbert, 116 U. S. 642, 29 L. ed. 755, 6 Sup. Ct. Rep. 590; Hough v. Texas & P. R. Co. 100 U. S. 213, 25 L. ed. 612; Cameron v. Great Northern R. Co. 8 N. D. 124, 77 N. W. 1018, 5 Am. Neg. Rep. 454, Thomp. Neg. § 484; Brickwood's Sackett, Instructions to Juries, §§ 1336–1477; Davy v. Great Northern R. Co. 21 N. D. 43, 128 N. W. 311.

The costs in this case were properly taxed. During the continuance of a cause, a witness may collect compensation for the time he is in attendance at court from the time of the continuance until the time fixed for trial. 30 Am. & Eng. Enc. Law, 1178, 22 Enc. Pl. & Pr. 1339, 1340; 40 Cyc. 2166; Smith v. Nelson, 23 Utah, 512, 65 Pac. 485; Barber v. Parsons, 145 Mass. 203, 13 N. E. 491; Ferguson & M. Lumber Co. v. Tiede, 130 Mo. App. 269, 109 S. W. 850.

Fisk, J. Plaintiff and respondent sustained personal injuries while in defendant's employ in its machine shops at Devils Lake; and he brought this action to recover damages therefor, alleging that such injuries were occasioned by the negligence of the defendant in failing to provide suitable machinery and tools for doing the work in which plaintiff was engaged. He recovered judgment in the court below in the sum of $1,400, and costs. Thereafter defendant moved for judgment notwithstanding the verdict or in the alternative for a new trial, which motion was denied and the appeal is both from the order and from the judgment.

The statement of facts made in the brief of respondent is, in the main, correct, and such statement is substantially as follows:

"Plaintiff was engaged as a machinist's helper by defendant company at its shops in Devils Lake. At the time of receiving the injury to his foot he was acting as a helper to Carl Lund, a machinist, and was under Lund's control and authority. They were working at an air press, engaged in pressing a bushing into a link which is a part of a locomotive. The link which fell on plaintiff's foot weighed about 150 pounds.

The air press and its appurtenances consist of a table with an iron top or surface about 5 inches thick and 3 feet wide, and 5 feet long.

The legs of the table or frame work upon which this iron cover is placed is made of wood. The air cylinder and piston are set or suspended over this table by two arms made of wrought iron, having hooks or lips on each, which are bent to a right angle and fit underneath the iron that forms the surface of the table, and over flanges on the lower head of the air cylinder respectively, and bolted to their respective fastenings. Such arms or bars of iron are about 8 inches wide and 2 inches thick. Where these arms or upright pieces are fastened to the table and to the cylinder head there was some play or lost motion owing to the fact that the respective irons forming the top of the table, the flange on the cylinder head, and the arms, were not bolted or fastened snugly or securely together.

The piston of the press has a 9-inch stroke, and when at the farthest possible distance from the table it is 18 inches, its closest possible distance is 9 inches. When the air is turned on, the piston moves quite rapidly, but not fast enough to strike a blow. Such air press has a pressure of 14 tons. Immediately under the piston, in the face of the table, is a hole, which is left open when pushing out bushing, etc., but when putting in bushing it must necessarily be covered with blocking or bars of iron. To use the press effectively for the work Lund and his helper were doing, it was necessary to block the link or rocker arm upon blocks, so that the piston of the air press would reach the bushing in order to drive or push it in. For the purpose of this blocking the railway company furnished what is known or called "channel irons," and such irons had been in use for a long time prior to the accident and for a short time thereafter, at which time other irons were furnished for such purpose. The testimony shows that the flanges of these channel irons were partly broken off, and there were some pieces cracked or chipped off along the edges. (Such fact, however, did not render the same unfit for such purpose.)

Lund, the machinist, and Ness, his helper, took this link or rocker arm to the air press, where Lund arranged the blocking upon which to lay such link, and he and plaintiff lifted the link onto this blocking. Ness held or steadied the link while Lund turned on the air by a valve which drove the piston down. When the bushing had gone about three quarters of the way into the hole it stopped. The 14 tons' pressure being unable to move it farther, Lund took a sledge hammer and

hit the blocking on top of the bushing in order to give it a fresh start, whereupon the blocking for some reason gave way, and the link fell from the table onto the plaintiff's foot, causing the injury complained of.

The air press is correctly shown by photographs which were introduced in evidence, from which we are enabled to understand the mechanism thereof much better than would be possible from a mere description of such machine. The testimony discloses that this link or rocker arm, into the end of which Lund and the plaintiff were engaged in inserting such bushing, could have been and properly should have been, entirely blocked up on such table to the proper height, instead of being held at one end by the plaintiff, but presumably plaintiff obeyed Lund's instructions in holding the same in his hand, and it is fair to assume that the foreman of the shop, who frequently passed by such press while in operation, had knowledge of and presumably acquiesced in the method thus employed by such machinist. The testimony also discloses that the machinist was not restricted to the use of these particular channel irons for blocking purposes, but that there were numerous other suitable irons of different sizes in and about the shop which he was at liberty to select at his discretion, and the custom was for the different workmen to get whatever tools and blockings they wanted. Lund testified that the channel irons which were used were perfectly satisfactory for the purpose. The blocking which was used on the occasion in question consisted of these two channel irons, which were placed on the table over the hole and under the piston, then the end of the link containing the hole into which the bushing was to be forced was placed on top of these irons, and the bushing on top of such link over the table hole, and another flat piece of iron about 8 inches long on top of the bushing. The piston was then forced down on top of such blocking, forcing the bushing into the link about three quarters of the way when it stopped, and while plaintiff was still holding such link, Lund, as before stated, struck a glancing blow with a sledge hammer on top of such blocking, whereupon the blocking gave way and the link fell on plaintiff's foot as above stated.

In view of our conclusion that the trial court erred in denying the motion for a directed verdict, we need notice but the one assignment of error predicated upon such ruling.

As stated by appellant's counsel, the negligence alleged in the complaint is, first, that the air press was defective; and, second, that the irons furnished for blockings were defective and unsuitable for such purpose. In order to sustain the recovery, therefore, the proof must reasonably tend to disclose that the proximate cause, or at least one of the proximate causes of the accident, was either one or both of these alleged defects.

The rule which must guide us in determining whether there is any evidence sufficient to require its submission to the jury upon either of such issues is well settled. All conflicts in the evidence must be disregarded, and such evidence is to be construed most favorably to the plaintiff.

As stated by this court in Cameron v. Great Northern R. Co. 8 N. D. 124, 77 N. W. 1016, 5 Am. Neg. Rep. 454, "the test is whether there is any competent evidence in the case reasonably tending to sustain the cause of action alleged; and, if the evidence is such that intelligent men may fairly differ in their conclusions thereon upon any of the essential facts of the case, it is error to withdraw the evidence from the consideration of the jury." See also Zink v. Lahart, 16 N. D. 56, 110 N. W. 931, and Hall v. Northern P. R. Co. 16 N. D. 60, 111 N. W. 609, 14 Ann. Cas. 960.

In the light of the above rule we will first examine the evidence with reference to the alleged negligence of defendant in failing to furnish suitable blocking irons for use in operating said air press. The testimony seems to be uncontradicted that the channel irons which were used at the time of the accident are the same irons which had been used for such purpose ever since the air press was installed some two years prior to the accident, or at least for a considerable length of time. The testimony also discloses that such irons were used for some time after the accident, and then other irons were furnished for use in place of the old ones. It seems to be undisputed that the flanges on these channel irons were broken or chipped off in many places, but it does not appear that they were for this reason unsuitable for the use to which they were put, although the witness Hann gave it as his opinion or conclusion, based on a description of the blocks, "that if the same play was in this machine at the time of the accident that they would have a number of these accidents, and an accident would almost be unavoidable no matter

how they placed the blocks; that is, if they were in the condition they said they were." And the witness Tideman testified that he thought the regular steel irons are better blocking than the channel irons. But plaintiff's witness, Lund, the machinist who placed these blocks on the air press table just prior to the accident, testified: "We get the different pieces of iron we use for blocking there on the press. There were quite a few of them of different shapes and sizes lying around the press. If we didn't see what we wanted we would get it; we had all we wanted there." And referring to the two particular pieces of iron in question, he testified: "The uprights or perpendiculars are two channel pieces, and are intact. I examined these pieces of iron right along before the accident. We used them every day pretty near. They were pieces we used to cover the hole with, and were considered good for the purpose." This witness also testified that there were a lot of pieces of iron within 10 or 15 feet from the press, of different shapes, and he supposes he could have used them to build up the 4 inches from the table to the bushing and the link, and if there wasn't a piece of iron at the press that suited his purpose he would go and get one; and both this witness and the plaintiff Ness made a written statement, after the accident, to the effect that there was no imperfection in the machinery or appliances.

There is much more testimony bearing upon this question, but it is all of like character, and we are firmly convinced, from a consideration of all such testimony, that there was no room for intelligent men to differ as to the fact that such channel irons were suitable for the use to which they were put, and that the accident cannot be attributed to any defects therein. Furthermore, we fail to see how actionable negligence can be predicated upon the use of such channel irons, for the obvious reason that the testimony conclusively shows that both Lund and the plaintiff knew, or must have known, as much or more about the condition of such irons as the master or vice principal knew, for they were handling and using the same almost daily, and sometimes more frequently, and it is undisputed that plenty of other pieces of iron suitable for blocking were near at hand and at their disposal. Surely under these conditions the master cannot be held liable, even though such channel irons were not the most suitable for the purpose. Ling v. St. Paul, M. & M. R. Co. 50 Minn. 160, 52 N. W. 378. See also Labatt, Mast. & S.

§§ 603–621, and cases cited. In § 603 this author states the rule as follows: "It is well settled that, where the master has provided an adequate and readily accessible stock of suitable appliances in good condition, from which to make a selection, and the imperfection of an instrumentality selected therefrom was, or ought to have been, apparent to the servant who selected it, the master cannot be held responsible for injuries which are sustained by the use of that instrumentality, whether the sufferer be the servant himself who made the selection or a coemployee." The above rule is, we believe, in accordance with the unanimous holdings of the courts.

We are forced to the conclusion, therefore, that no recovery can be sustained upon this alleged ground of negligence.

This brings us to a consideration of the only other ground of negligence relied on by plaintiff; to wit, that the air press was defectively constructed. In this connection we deem it proper to state that, while the complaint alleges such fact in a general way, it is very apparent that the main act of negligence relied on is the alleged failure of defendant to furnish suitable blocking irons for use in the operation of such press. This is made quite clear from an examination of the complaint and also of the bill of particulars furnished on defendant's demand. The portion of the complaint with reference to defendant's alleged negligence is as follows: *"That said air press was defectively constructed, and the tools and irons used in connection with said air press were not the proper tools and irons for that purpose, and that said air press tools and irons were imperfectly constructed, defective and unsafe, and unfit for the purposes for which* they were being used, and the same were inadequate, and that said imperfect defectiveness, inadequacy, unsafeness, and unfitness could have been discovered and known by the use and exercise by said defendant of ordinary care and diligence, and that the same were, at the time aforesaid, known to said defendant and the same were unknown to this plaintiff. . . . That the said injury was wholly without fault or negligence of this plaintiff whatsoever, and was caused on account of the defective condition of said machinery and tools as more specifically herein set out."

And the bill of particulars thus furnished is as follows:

"You will please take notice that the following is a bill of particulars as demanded by you in the above-entitled action, that is to say, that the

plaintiff was injured by reason of defective construction of tools and irons used in connection with said air press, and not the proper tools and irons for that purpose, and said air-press tools and irons were imperfectly constructed, defective and unsafe, and unfit for the purposes for which they were used, and the same were inadequate, and not properly constructed, and the tools and irons used in connection with the work being performed were not proper irons for the purposes for which they were used, and that at the time of the injury they were engaged in the work of pressing bushing into a link, and that the force of power furnished by said air press was not sufficient, and that the machinist in charge of said air press, to assist said air press in driving said bushing into the link, struck some of the irons with a sledge, causing said irons to fall, and that said irons fell, one of the irons upon the foot of the plaintiff, crushing it, as alleged in the complaint; that the irons referred to above were irons used to build up the platform upon the bushing and below the piston rod, for the piston rod to rest upon to drive the bushing into the link; that said irons so used to build a platform upon said bushing extending upward for the piston rod to drive said bushing in by presssure upon said irons were not irons constructed for that purpose, but were pieces of machinery, and that said pieces of machinery were furnished by the company, and the only pieces of iron or tools furnished by the defendant for that purpose, and that said pieces of iron so placed as aforesaid, being struck by the machinist in charge by a sledge hammer as aforesaid, caused said irons and the link upon which the machinist and plaintiff were working to fall upon plaintiff's foot from the table upon which the same were laying while said work was being done, thus crushing the foot of the plaintiff; that had there been sufficient power furnished by said air press it would not have been necessary for the machinist to have struck the iron as aforesaid, and had the defendant furnished proper irons, as aforesaid, for that work, the accident could have been avoided; that plaintiff was not an expert nor a machinist, and did not know of the defects or the liability of accident on account of the defects as herein stated."

It is therefore quite apparent, as above stated, that the chief, and in fact the sole, act of negligence relied on at the time the bill of particulars was prepared and served, was the alleged failure of defendant to furnish proper irons for blocking, and it apparently did not occur

to plaintiff that any other ground existed until sometime later. We refer to this merely as a circumstance proper to be considered in determining whether plaintiff established a sufficient case to require a submission to the jury of the question as to whether the air press was defectively constructed, and if so, as to whether such defect was a proximate cause of the plaintiff's injury. We assume that such question is in the case, notwithstanding the failure to mention such ground in the bill of particulars; for at the trial an attempt, without objection, was made to prove the same. We are therefore confronted with the question whether there is a substantial conflict in the testimony relative to such alleged defect in the construction of the air press which in any way can be said to have been a proximate cause of the plaintiff's injury. The specific defect relied on at the trial consists of a slight looseness or play at the ends of the side arms where they are bolted to the table and to the lower portion of the cylinders of the press. What is the status of the proof on this point? Both the plaintiff's witness Lund and the plaintiff signed written statements after the accident, to the effect that this press was in perfect working order at the time the accident occurred, and had no defects whatever, to their knowledge, and the accuracy of such statements was vouched for by them on the witness stand. The proof discloses that there was a slight play or lost motion at these points, the exact amount thereof being somewhat in dispute. It is not disputed that when the pressure is off there is both a horizontal and vertical play in the cylinder to a slight extent, but the proof discloses, and we think it beyond question, that no play whatever exists or can exist after the 14 tons' pressure is applied, and that on applying such pressure the piston is necessarily forced in a straight line towards the table. The pressure was on at the time of the accident, and the immediate cause of such accident evidently was the slanting blow struck by Lund with the sledge hammer on top of the block which rested on the bushing. It cannot be said, however, that in striking such blow Lund was not pursuing a proper, usual, and customary practice. The crucial question, therefore, is whether plaintiff has established that the slight looseness of the bolts fastening the side arms to the cylinder and table was a proximate cause of his injury, and that defendant was negligent in permitting such play to exist. These side arms are about 8 inches in width and 2 inches thick, and

made of wrought iron. The evidence is undisputed that the press at the time of such accident was and ever since has been in the same general condition as it was in when first installed, some two years prior, with the exception of the addition of an oil cylinder, which does not materially affect the question here involved. Such press was used for about two years prior to the accident, and had been used ever since such accident, down to the time of the trial,—two years,—without any change whatever, and so far as the record discloses, it worked perfectly during all this time. While there is a great deal of testimony in the record, of a conflicting nature, upon the question of the play or looseness at the ends of the side arms which extend from the table to the cylinders, there can be no doubt from such testimony, and we must accept it as a fact, that there was more or less play, both vertically and horizontally, when the power was not applied. But it nowhere appears that this in any way caused, or could have caused, the accident, and the jury could not properly so find. Plaintiff relies upon the testimony of Hann and Robinson, who were permitted to state as a conclusion that with such play or looseness the press would be more dangerous, but neither of these witnesses ventured an opinion as to the real cause of the accident. They did not nor could they, in the light of the other testimony, claim that such accident was caused by this play or looseness.

The machinist Lund, who was plaintiff's chief witness, and who was necessarily very familiar with this press, having operated it frequently, testified as follows: "At the time of the accident there might be a little play here in these arms. I would say the play is about the same as it is now. . . . I don't mean to say there was any imperfection or defect in the machinery. The machinery was all right." True, the latter testimony was stricken out on plaintiff's motion, but such ruling was manifestly erroneous. This witness, however, gave in effect the same testimony thereafter. Shortly after the accident he made and signed a written report of such accident, in which report he stated in substance that there were no defects in the machinery, tools, or appliances, and the plaintiff made a similar report, which was also introduced in evidence. Both Lund and the plaintiff swore at the trial that such reports were correct.

It would serve no useful purpose to quote at length from the testimony. It is sufficient to say that, from a careful consideration of the

entire evidence, we have no hesitancy in concluding therefrom that the air press was in reasonably good working condition, and that, in any event, the slight play or the so-called lost motion could not possibly have caused the blocking to give way, for the conclusive reason, to our minds, that there could have been no such looseness when the 14 tons' pressure was applied, as it was when the accident occurred. With the bushing pressed two thirds of its way into the hole, as the evidence discloses it was, and with a 14 tons' pressure thereon, it does not require a mechanical expert to know that it would be an utter impossibility for the piston, or the cylinders operating such piston, to assume a slanting line toward the table, without bending or breaking the heavy iron side arms connecting such cylinders to the table below; and it is equally absurd to contend, under these circumstances, that there could possibly have been at such time any play or looseness whatever at the ends of such arms. This being self-evident, the inevitable conclusion must follow that the cause of the blocking giving way must be accounted for on some other theory; and it is very apparent that the true cause was the failure of Lund to properly build up the blocking, and for which failure the defendant is, of course, not responsible. While we regret plaintiff's serious injury, and sympathize with him in his misfortune, we, at the same time, feel that our duty is plain, and that we must discharge it by directing the lower court to set aside the judgment herein, and to enter a judgment in defendant's favor, and it is accordingly so ordered.

ANNA J. ENGLERT v. FRED V. DALE.

(142 N. W. 169.)

Mortgage — valid upon its face — fraud and duress — setting aside — proof — evidence.

1. Before a mortgage which is valid and regular upon its face can be set aside by a court of equity for the reason that its execution was obtained by fraud and duress, there must be clear and convincing proof of such facts.

Note.—The authorities on the question of the validity of a mortgage procured by threats of prosecution of relative are reviewed in a note in 20 L.R.A.(N.S.) 484.

Evidence — insufficiency.

2. Evidence examined and *held* not to furnish such clear and convincing proof.

Threats of arrest — crime — mortgage — cancelation — loss — execution of mortgage.

3. Threat of a lawful arrest for an offense which has actually been committed is not in itself a sufficient ground for the cancelation of the mortgage which has been executed as a result of such threat, and to secure the maker of the threat for the loss occasioned to him by the commission of such crime.

Lands — homestead act — prior debts — patent — involuntary appropriation — mortgage — consideration.

4. Section 2296, Rev. Stat. U. S. Comp. Stat. 1901, p. 1398, which provides that no lands acquired under the provisions of the homestead act shall in any event become liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor, is intended as a prohibition on the involuntary appropriation of the homesteader's land by way of execution or attachment, and does not contemplate a restriction upon his power to voluntarily mortgage his interest therein, and a release of such a mortgage may constitute a valid consideration for the execution of another by another person and upon a different piece of land.

On Petition for Rehearing.

Appeal — trial de novo — findings not conclusive — law — facts.

5. In an appeal taken under § 7229, Rev. Codes 1905, and in which a trial *de novo* is asked, the supreme court is not concluded by the findings of the trial court either as to the law or as to the facts of the case.

Mortgage — action to set aside — consideration — written instrument — burden of proof — plaintiff.

6. The burden of proof in an action to set aside, for an alleged failure of consideration, a written instrument which is valid upon its face, is upon the plaintiff.

Opinion filed May 24, 1913. On petition for rehearing, June 19, 1913.

Appeal from the District Court for Mountrail County, *Fisk*, J.

Action to set aside a real estate mortgage. Judgment for the plaintiff, defendant appeals.

Reversed.

Statement by BRUCE, J.

This case comes before us for a trial *de novo* under the Newman act. The complaint, dated February 24, 1911, alleges that on the 21st day of

December, 1908, through fraud and coercion, duress and undue influence, the plaintiff executed to the defendant a mortgage on a quarter section of land. That said mortgage was and is entirely without consideration and foundation; that the plaintiff is an aged woman seventy-six years old (the proof showed sixty-seven), and of sickly, nervous disposition; that on the 21st day of December, 1908, one P. L. Higgins, an agent of the defendant, came to the plaintiff's land, having in his possession certain notes and a mortgage, and that he then and there requested the plaintiff to sign said notes and mortgage; that she refused to do so, and that thereafter and thereupon the said Higgins told plaintiff that her son, one C. L. Englert, had committed a criminal offense and had sold mortgaged property, and that unless she signed said notes and mortgage he would get out a warrant for the arrest of the said C. L. Englert and have him sent to the penitentiary; and that said P. L. Higgins then and there threatened to cause the arrest of her said son and send him to the penitentiary; and the said P. L. Higgins threatened to accuse the said son of a crime and felony if this plaintiff did not sign the notes and mortgage, and that by reason of the threat made by P. L. Higgins this plaintiff was put in great fear, and was coerced and by duress compelled to sign said notes and mortgage, and the signature of this plaintiff to said notes and mortgage was extorted from her by means of such threats against her son; that she would not have signed said notes except for the fear induced by such threats. Then follows a prayer for a cancelation of said notes and mortgage, and that the same be declared null and void. The answer denies all duress and coercion, and alleges that the mortgage was given to secure the sum of one thousand dollars ($1,000), and interest. The trial court found that the charges of coercion and duress set forth in the complaint were true, and that "on the 21st day of December, 1908, one P. L. Higgins, who was at said time the agent of the above-named defendant, came to the place where the plaintiff was then living with her youngest son, with whom she had always lived, the said plaintiff being alone in the house at said time, the son being away; and at that said time the said P. L. Higgins requested the plaintiff to give a mortgage on her land to the said Dale, and the plaintiff refused to do so, and thereupon the said Higgins told her that unless she gave the mortgage, Dale, the defendant, would send her son to the penitentiary, and the said

Higgins threatened to charge her son with a crime if she did not sign the mortgage, and that the said plaintiff executed the said notes and mortgage by reason of, and only by reason of, the threats which the said Higgins made, and to save her son from going to state prison; and that only for such threats she signed said mortgage, and would not have signed same but for such threats, and that said mortgage was procured through duress." His conclusions of law were that the plaintiff was entitled to judgment, declaring the said mortgage and notes null and void, and that the said mortgage be declared canceled. From this judgment an appeal was taken.

Noble, Blood & Adamson, for appellant.

The consent of parties to a contract must be free; it is not free, when obtained by duress, menace, threat, undue influence, or mistake.

Rev. Codes, 1905, §§ 5286–5290. McCormack v. Volsack, 4 S. D. 67, 55 N. W. 145; Comp. Laws, §§ 3504, 3505.

To threaten to have the criminal laws of the state enforced does not constitute duress or menace. Gregor v. Hide, 10 C. C. A. 290, 27 U. S. App. 75, 62 Fed. 107.

E. R. Sinkler, for respondent.

The mortgage is void because obtained by menace, coercion, duress, and undue influence, and because it is without consideration. Rev. Codes 1905, §§ 9217, 9218, 5286–5296.

It is duress when a mother is induced by threats to do an act to save her son from criminal prosecution. Weiser v. Welch, 112 Mich. 134, 70 N. W. 438; Shultz v. Culbertson, 46 Wis. 313, 1 N. W. 19; Cribbs v. Sowle, 87 Mich. 340, 24 Am. St. Rep. 166, 49 N. W. 588; McCormick Harvesting Mach. Co. v. Hamilton, 73 Wis. 486, 41 N. W. 727; Eadie v. Slimmon, 26 N. Y. 9, 82 Am. Dec. 395; Harris v. Carmody, 131 Mass. 51, 41 Am. Rep. 188; Williamson H. F. Co. v. Ackerman, 77 Kan. 502, 20 L.R.A.(N.S.) 484, 94 Pac. 807.

A mortgage given by a woman seventy years old, under threats to send her son-in-law to jail if she refused, was held void for duress. Bentley v. Robson, 117 Mich. 691, 76 N. W. 146.

Guilt or innocence is immaterial, in determining the question of duress. Thompson v. Niggley, 53 Kan. 664, 26 L.R.A. 803, 35 Pac. 290; Mack v. Prang, 104 Wis. 1, 45 L.R.A. 407, 76 Am. St. Rep.

848, 79 N. W. 770; Hargreaves v. Korcek, 44 Neb. 660, 62 N. W. 1086; Giddings v. Iowa Sav. Bank, 104 Iowa, 676, 74 N. W. 21; Leflore County v. Allen, 80 Miss. 298, 31 So. 815; Benedict v. Roome, 106 Mich. 378, 64 N. W. 193.

Equity will cancel a mortgage given through fear and threats of criminal prosecution of a relative. Davis v. Smith, 68 N. H. 253, 73 Am. St. Rep. 584, 44 Atl. 384; Henry v. State Bank, 131 Iowa, 97, 107 N. W. 1034; Meech v. Lee, 82 Mich. 274, 46 N. W. 398.

Promise to suppress a prosecution will not support a promise to pay money. Racine-Sattley Mfg. Co. v. Pavlicek, 21 N. D. 222, 130 N. W. 229.

Findings fully sustained by the evidence will not be reversed by the appellate court. Jasper v. Hazen, 4 N. D. 1, 23 L.R.A. 58, 58 N. W. 454; James River Nat. Bank v. Weber, 19 N. D. 702, 124 N. W. 952; Hostetter v. Brooks Elevator Co. 4 N. D. 357, 61 N. W. 49.

A contract of suretyship must be supported by a sufficient consideration. Plaintiff was merely a surety—without consideration. Davis v. Wells, F. & Co. 104 U. S. 159, 26 L. ed. 686; Allison v. Wood, 147 Pa. 197, 30 Am. St. Rep. 726, 23 Atl. 559; Kulenkamp v. Groff, 71 Mich. 675, 1 L.R.A. 594, 15 Am. St. Rep. 283, 40 N. W. 57; 27 Am. & Eng. Enc. Law, 446, 447, and cases cited; 26 Am. & Eng. Enc. Law, 411, and cases cited.

The release of the mortgage on the government homestead was no consideration for the new mortgage. Sharpe v. Rogers, 12 Minn. 174, Gil. 103; Nichols v. Mitchell, 30 Wis. 329; Hooker v. Knab, 26 Wis. 511; Newell v. Fisher, 11 Smedes & M. 431, 49 Am. Dec. 66; New Hampshire Sav. Bank v. Colcord, 15 N. H. 119, 41 Am. Dec. 686; Taylor v. Weeks, 129 Mich. 233, 88 N. W. 466; Luken's Appeal, 143 Pa. 386, 13 L.R.A. 582; Duck v. Antle, 5 Okla. 152, 47 Pac. 1056; Long v. Towl, 42 Mo. 545, 97 Am. Dec. 355; Price v. First Nat. Bank, 62 Kan. 743, 64 Pac. 639; Robinson v. Jewett, 116 N. Y. 40, 22 N. E 224; 27 Am. & Eng. Enc. Law, 494.

BRUCE, J. (after stating the facts as above). There is much in the evidence in this case to support the claim of the plaintiff. We are satisfied, however, that there is no such clear and convincing proof of fraud or duress as would justify us in setting aside the mortgage. There

is evidence to the effect that the plaintiff was sixty-seven years old, that she had five living children, that Cassius Englert was the youngest son. She testified that she had not seen him since the 5th day of August, 1910, when he left the country, charged with having sold a mortgaged threshing machine, that they had lived together up to that date for a number of years upon his farm; that on the 21st day of December, 1908, between 1 and 2 o'clock P. M. one P. L. Higgins drove to the farm with a liveryman by the name of Johnson; that he knocked at the door, and asked where the boy, Cassius, was; that she told him that he was at Columbus after coal; that Higgins next said that "Cad (Cassius), he wanted—he had some papers that he wanted me to make out—said he had committed a criminal offense and he would send him to state prison—Mr. Dale could send him to state prison, and would if I didn't fix them up—Mr. Dale thought if he came to me I would fix it up;" that she believed what he said; that she asked Higgins to wait until her boy came home, but he said he could not wait; that she was pretty badly scared, and thought that perhaps he would send her boy to the penitentiary; that her health was bad at the time and she was excited; that she signed the notes and mortgage to save her son from going to state prison; that she did not owe Mr. Dale anything; that she had no reason for signing the notes and mortgage except to save her boy; that she thought Higgins drew up the mortgage while he was at her house, that he was writing for quite awhile, he said he was a notary public and had authority to handle these papers; that after she signed the mortgage she asked Higgins to wait until the boy would come; that John Johnson, the liveryman, was out in the barn at the time of the talk about putting her son into the penitentiary. She testified that Higgins told her that her son "had mortgaged property and didn't tell Mr. Dale, and had taken the bankrupt law," and that she believed if she didn't sign the mortgage that they would put her son in the penitentiary; that Higgins didn't tell her that her son had sold mortgaged property, he said that he had mortgaged property; that she didn't have any knowledge of any agreement between her son and with Mr. Dale for the giving of this mortgage, and that Mr. Higgins didn't tell her about any such agreement; that Mr. Higgins didn't tell her that Mr. Dale wanted her to give this mortgage so that he could release the preliminary mortgage on Cad's homestead; that she didn't

complain to Mr. Dale until two years after (last fall); that she had written to him in the May before, and asked him if he had canceled the mortgage or released the mortgage; that she didn't see Mr. Dale before, because she supposed that as long as Mr. Dale held that (the mortgage), he wouldn't make him (Cassius), any trouble; that Higgins talked with her, and the threats were made about half an hour before Johnson came in, and that he did not hear them; that at the actual time she signed the papers there wasn't anything said about putting her boy in the penitentiary, nor was anything said at the time that Johnson witnessed them; that her son at this time, or prior to this time, started to go through bankruptcy, but she did not know whether he went through. She said "that Higgins told her that her son had mortgaged property and had taken the benefit of the bankrupt law, and didn't tell Mr. Dale, and Mr. Dale could send him to state prison,—that is just exactly what he said to me." The witness Johnson, the liveryman, testified that he witnessed the mortgage, and that while he was in the house nothing was said about sending the plaintiff's son to the penitentiary. He, however, fully corroborated the plaintiff in her statement that he was absent for quite a little while at the barn, taking care of his horses. He also testified that when he and Higgins drove away from the house, Higgins told him to "keep still about what was going on." The witness Higgins denied having used any duress or coercion. He testified that an arrangement had been made with the son for a release of the mortgage on the government homestead and the taking of a mortgage on the mother's premises, and that the mortgage was executed by the mother in furtherance of such agreement. He does not deny, however, that he told Johnson to keep still about what was going on. The defendant, Dale, also testifies to an agreement having been made with the son for the transfer of the mortgages. There is also testimony that the son, after the execution of the mortgage in question, sold an engine, on which the defendant had a chattel mortgage, and left the country. There is evidence to show that before he left he went to the office of Mr. Sinkler, attorney for the plaintiff, to make arrangements for bringing the action at bar, and that the said Sinkler never saw the plaintiff until the morning of the trial. Sinkler testifies that in the month of February, 1910, Cassius Englert told him about the matter, and that later one Wallie George came to his office and said he was acting for Mr. Dale in the

matter of the mortgage, and also told him that Cassius Englert had been guilty of selling mortgaged property, and that if he didn't fix the matter up he would send him to the penitentiary; that the said Sinkler thought the mortgaged property was a team of horses, and that they didn't say anything to him about an engine. It is also shown that about this time the said Sinkler communicated with the defendant, Dale, about the mortgage, and that on the 3d day of January, 1910, over a year after the giving of the mortgage, and more than a month after Dale had been notified that proceedings were going to be instituted against him, the release on the mortgage on the homestead of Cassius Englert was recorded.

The defendant's contention is that there is no proof of duress in the case. He also contends that the evidence shows laches on the part of the plaintiff, the action not being brought until over two years after the giving of the mortgage. He also contends that the evidence shows that the sons were the parties chiefly instrumental in starting the suit, and argues that the proof shows conclusively a conspiracy on the part of the sons not merely to have the mortgage on Cassius's farm released, but subsequently to have that on the farm of his mother declared void. He contends that this action was really brought by the sons, and not by the mother.

Upon a careful perusal of the record, we see much in this contention. We are, at any rate, well satisfied that no clear and convincing proof of fraud or duress is shown, such as must be furnished before we are justified in setting aside an instrument of the nature of the one before us. In the place, indeed, of being convinced that a fraud was committed upon the plaintiff, we read in the record evidence of a fraudulent attempt on the part of the plaintiff and her two sons to defraud the defendant. Plaintiff must have known that the prior mortgage on her son's homestead was to be and had been released. She testifies that she was induced to sign the mortgage upon her own farm, because of some threat that her son Cad would be prosecuted by Dale for mortgaging property and then going into bankruptcy, when the evidence shows that Dale was a witness for her son in those very bankruptcy proceedings. She admitted that she lived with her son on his place at the time, and had never been absent from him, and had lived with him there for two years after signing the mortgage and until he left

the country, for the reason, as given by his brother, that "he was getting himself into trouble by staying." Yet at no time before the bringing of the suit did she take any steps to cancel the mortgage, and never said anything about it until May 27, 1910, when she merely wrote Mr. Dale to ask if the "mortgage had been released," or that "she wanted to see him (Dale) about the mortgage." It is inconceivable that during these two years she should not have spoken to her sons of the visit to her and her execution of the papers, and that at least one of her sons should not have acquainted her with the facts. There are only two conclusions to be had, and these are, either that she executed the mortgage voluntarily, or that the criminal offense that she referred to was not a bogus one, but a real one, which the evidence shows that her son may in fact have committed before the visit, that of mortgaging her horses for his own debt and in his own name. In the latter case her mortgage would not have been deemed to have been executed under duress. Gregor v. Hyde, 10 C. C. A. 290, 27 U. S. App. 75, 62 Fed. 107; Compton v. Bunker Hill Bank, 96 Ill. 301, 36 Am. Rep. 147; Hilborn v. Bucknam, 78 Me. 482, 57 Am. Rep. 816, 7 Atl. 272; Landa v. Obert, 45 Tex. 539; Sanford v. Sornberger, 26 Neb. 295, 41 N. W. 1102. Added to these are the facts that the action was started by the sons, and all the negotiations with the attorney were had by them, and even then not until after Cad had left the country and just after the recording of the release of the mortgage on his own land. It is to be remembered that the plaintiff in her testimony was incoherent as to what crime Higgins had charged her son with having committed. The only suggestion of fraud, indeed, that there is to be found, is in her report of a conversation with Higgins, which is flatly contradicted by him, and the fact of the visit of Higgins and his driver, Johnson, in the absence of her sons. It is to be remembered, however, that these parties stopped at the farms of both sons on their way out, and did not find them in; and the inference, if any, is that they desired that the sons should know of their intended visit to their mother. There is also, of course, evidence of fraud in Higgins' admonition to Johnson to keep quiet about the matter, but this admonition can well be accounted for by the fact that Cad was in financial straits, and the natural desire of Dale to keep his negotiations with him hidden from other creditors. We, too, do not approve of the practice of an agent acting as a notary public in mort-

gages and deeds which are taken on behalf of his principal, and such is condemned in many jurisdictions. The practice, however, seems to be common in North Dakota, and seems to be sanctioned by the weight of authority (1 Cyc. 555); and in view of the practice and the sanction of the weight of authority, we can hardly at this time set aside a conveyance for this reason. We do not, on a perusal of the record, see that clear and convincing evidence of fraud which will justify us in setting aside the mortgage, especially as to do so would be to deprive the defendant of his security for his debt, and leave the two farms to be inherited by the two sons, free from all debts and encumbrances, though the debt from Cad is unpaid and he has left the country as a practical fugitive from justice.

But counsel for respondent contends that there was a lack of consideration for the mortgage, or at any rate a failure of consideration. He contends that the release of a mortgage given on an unproved homestead is no consideration. He also contends that the respondent was simply a surety in the transaction, and that such contract required a consideration, and that the promise to release was not complied with, and that therefore there was a failure of consideration, which avoided the mortgage. We think, however, that there is nothing in this contention. The evidence shows that a release of the mortgage was executed by Dale on April 22, 1909, and nearly two years before the bringing of the action at bar. It also shows that immediately after the execution of the mortgage by the mother, Dale told the son Cad that he could have the release whenever he desired it. It is true that the release was not recorded until January 19, 1910, and probably after Dale had some knowledge that proceedings might be instituted against him. There was no obligation, however, on the part of Dale, the mortgagee, to record the release, provided that it was executed and acknowledged in proper form, which it was. See § 6173, Rev. Codes. There was no failure of consideration, and the delay in recording is evidence against, rather than in favor of, the respondent. The inference, if any, is that Cassius Englert kept the release until the last moment, so that his creditors would know nothing of its existence, and did not record the same until he was about to start proceedings against Dale for the cancelation of the second mortgage, and in which case he would naturally desire the record to show a release of the prior one. Counsel, too, is

in error in thinking that a mortgage upon a government homestead on which patent has not issued is a nullity. Section 2296 of the U. S. Rev. Stat. U. S. Comp. Stat. 1901, p. 1398, which provides that "no lands acquired under the provisions of . . . [the homestead act] shall in any event become liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor," has repeatedly been held as intended as a prohibition on the involuntary appropriation of the homesteader's land by way of execution or attachment before final proof, but not to contemplate a restriction upon his power to voluntarily mortgage his interest therein. Webber v. Ladlier, 26 Wash. 144, 90 Am. St. Rep. 726, 66 Pac. 400; Dickerson v. Bridges, 147 Mo. 235, 48 S. W. 825; Stark v. Duball, 7 Okla. 213, 54 Pac. 453; Adams v. McClintock, 21 N. D. 483, 131 N. W. 394.

The judgment of the District Court is reversed, and judgment ordered in favor of the defendant and appellant, and dismissing the action of plaintiff and respondent.

On Petition for Rehearing.

BRUCE, J. Counsel for respondent argues that the finding of the trial court must prevail in this case. He states that "in reviewing findings of fact made by a trial court it must be presumed on appeal that the decision of such a court is sustained by the weight of evidence, and unless it appears that the testimony clearly preponderates against such decision, the presumption that the findings are right must prevail." He is clearly in error, however, in so far as the present action is concerned. This is an equity case, and has come before this court for a trial *de novo* under the provisions of the so-called Newman act (§ 7229, Rev. Codes, 1905). The rule which prevails in cases which are triable by a jury does not prevail in equity cases, which are tried and appealed under the provisions of § 7229. A trial *de novo,* in short, is a trial *de novo.*

Counsel also confuses a lack of consideration with a failure of consideration. He alleges in his complaint that "the plaintiff further states that the said mortgage was and is entirely without consideration," and seeks to sustain this proposition by proof that the promise to release a mortgage upon the son's unpatented government homestead was

the consideration for the subsequent mortgage, and that this promise was not complied with prior to repudiation of the mortgage by the plaintiff. This, to our mind, would be a failure, and not a lack of consideration. This was the main reason for the statement made by the court that a mortgage made upon a government homestead before final proof was not a nullity; because upon the theory of a nullity, and this theory alone, could there be any contention that there was no consideration for the execution of the mortgage by the mother. Counsel says that he never put forth such a contention, and "that it is an imputation of ignorance for this court to say that he so contended." He certainly, however, stated in his brief that "a mortgage upon government land by one in possession of same is void if the homesteader never perfects his title to the land under the homestead laws. The mortgage does not attach until the patent issues," and upon this statement he based his claim that "the agreement to release or the releasing of the preliminary mortgage on government land" furnished no consideration for the mother's mortgage. So, too, practically all, if not all, of the cases which he cites, are cases in which the contract or mortgage for which the second obligation was sought to be substituted or to operate as a security was void or in which the original agreement was itself void.

Counsel also claims that there is no proof in the record that the release of the Cassius Englert mortgage was delivered before the defendant, Dale, had notice that Mrs. Englert intended to repudiate the subsequent mortgage upon her property. He, however, has entirely failed to realize on whom the burden of proof rests in this case. It is for the plaintiff to show that the release was not delivered, and not for the defendant to show that it was. There is certainly nothing in the evidence to show that it was not delivered prior to the notice of the alleged repudiation of the subsequent mortgage, while the date of the release is prior to that time. It is to be remembered that this is an action to set aside a written instrument, which upon its face is valid and has all the outward indications of an instrument that was solemnly executed. It must be plain that the burden of proof to show either an absence or a failure of consideration is upon the plaintiff. This, indeed, is not only the rule of the common law, but the rule which the statute prescribes. See §§ 5325 and 5326, Rev. Codes 1905.

The petition for a rehearing is denied.

JOHN MESSER v. HENRY BRUENING.

(— L.R.A.(N.S.) —, 142 N. W. 158.)

Plaintiff, driving south with a single horse and buggy, in the daytime, met defendant driving an automobile, on a level prairie highway, unfenced, without embankments, and with plowed fields on either side. Upon meeting, defendant ran the machine to his right side of the road, near the plowed field to his east. The only substantial conflict in the testimony is as to whether his approach was at a reasonable speed, and whether the machine was stopped after its turn to the right. Plaintiff, in the meantime, kept the road, without attempting to turn to his right, thus driving his horse nearer to the machine, when the horse became unmanageable, turned toward the machine, and crossed in front of it into the east field. Plaintiff, in stopping the horse, pushed out the front of the buggy box, and received injuries for which he seeks to recover damages. During defendant's approach with the machine, plaintiff's wife, occupying the seat with him, raised her hands and screamed to defendant to stop the automobile, plaintiff meanwhile continuing to drive toward it but giving no signal himself for the machine to stop. The condition of the road was such that plaintiff could have turned off the beaten track and to his right, and kept a reasonable distance from the automobile. The complaint seeks (1) a recovery for defendant's negligence at common law on specific grounds alleged, and (2) for negligence and damages resulting because of defendant's alleged failure to heed the alleged statutory signal to stop, given by plaintiff's wife to the automobile driver. The trial court instructed upon both theories, to the effect that the signal of the wife was a signal by the driver. From an $800 recovery, defendant appeals. It is *Held*:—

Instructions — jury — negligence — ordinary care — verdict — pleading — specific negligence.

(1) The court gave the following instruction: "If ordinary care or prudence required Henry Bruening to do some particular thing which he failed to do upon this occasion, then he is guilty of negligence." This was error in that it permitted the jury to speculate upon what might be negligence, and base their verdict upon something they might infer to be negligence other than the specific negligent acts charged in plaintiff's complaint.

Vehicle — signal — automobile — driver — occupant — liability — negligence — common law — question for jury.

(2) The statutes of this state, as amended by chapter 42 of the Session Laws

Note. — As to the duty and liability of the operator of an automobile with respect to horses encountered on highway, see notes in 1 L.R.A.(N.S.) 223, and 14 L.R.A. (N.S.) 251.

of 1909, specifically require that such signal shall be given by the driver of an animal-propelled vehicle, and the signal by an occupant is insufficient to constitute the statutory signal to be given by the driver. Until such signal is given by the driver, no liability under the statute for failing to stop attaches. But, in the absence of a signal, a failure to stop, or a failure to heed signals given by other occupants of the vehicle than the driver, may be matters for the jury with all the facts of the case upon questions of common-law negligence involved.

Opinion filed May 17, 1913. Rehearing denied June 19, 1913.

From a judgment of the District Court for Foster County, *Coffey,* J., defendant appeals.

Reversed and new trial granted.

T. F. McCue, for appellant.

The plaintiff should not have been permitted to give his conclusions to the jury that the buggy was all right. American Soda Fountain Co. v. Hogue, 17 N. D. 375, 17 L.R.A.(N.S.) 1113, 116 N. W. 339.

Natural or imminent dangers do not necessarily follow or result from the use of an automobile. Expressions of such character by the court in its charge to the jury are prejudicial error. Moffitt v. Cressler, 8 Iowa, 122; Farr v. Fuller, 8 Iowa, 347.

Unsupported and misleading instructions constitute reversible error. Mundhenk v. Central Iowa R. Co. 57 Iowa, 718, 111 N. W. 656; Mannion v. Talboy, 76 Neb. 570, 107 N. W. 750; Kilpatrick v. Richardson, 37 Neb. 731, 56 N. W. 481; Lang v. Bailes, 19 N. D. 582, 125 N. W. 891; Pattee v. Chicago, M. & St. P. R. Co. 5 Dak. 267, 38 N. W. 435.

Our laws regulate the use of automobiles. Rev. Codes §§ 2173, 2174; as amended by chap. 42, Laws 1909.

It is error for the court to place before the jury, in its instructions, matters and questions not presented in the pleadings. Stein v. Seaton, 51 Iowa, 18, 50 N. W. 576; Whitsett v. Chicago, R. I. & P. R. Co. 67 Iowa, 150, 25 N. W. 104; Cressy v. Postville, 59 Iowa, 62, 12 N. W. 757; Barron v. Northern P. R. Co. 16 N. D. 277, 113 N. W. 102; Forzen v. Hurd, 20 N. D. 42, 126 N. W. 224; Sargent v. Linden Min. Co. 55 Cal. 204, 3 Mor. Min. Rep. 207; Western Home Ins. Co. v. Thorpe, 40 Kan. 255, 19 Pac. 631.

The court has no right to tell the jury they can give a verdict for any stated amount. 11 Enc. Pl. & Pr. 96; Pierce v. C. H. Bidwell Thresher Co. 153 Mich. 323, 116 N. W. 1104; Staal v. Grand Street & N. R. Co. 107 N. Y. 625, 13 N. E. 624, 5 Am. Neg. Cas. 273; Britton v. Grand Rapids Street R. Co. 90 Mich. 164, 51 N. W. 276, 4 Am. Neg. Cas. 123.

Instructions should be so framed and given as to guide the jury in considering the issues. Chicago City R. Co. v. Rohe, 118 Ill. App. 322; Coates v. Burlington, C. R. & N. R. Co. 62 Iowa, 493, 17 N. W. 760.

There was no evidence of permanent injury. Illinois Iron & Metal Co. v. Weber, 196 Ill. 526, 63 N. E. 1008; Moorehead v. Hyde, 38 Iowa, 382; Reed v. Chicago, R. I. & P. R. Co. 57 Iowa, 23, 10 N. W. 285; Barron v. Northern P. R. Co. 16 N. D. 277, 113 N. W. 102, and cases cited; Leeds v. Metropolitan Gaslight Co. 90 N. Y. 26; Chicago & A. R. Co. v. Martin, 120 Ill. App. 254; Cicero & P. Street R. Co. v. Richter, 85 Ill. App. 591.

The defendant's request for instructions as to the position and acts of the parties at time of accident, as shown by the evidence, should have been granted. Rochford v. Barrett, 22 S. D. 83, 115 N. W. 522; Garland v. Keeler, 15 N. D. 548, 108 N. W. 484.

Edward P. Kelly, for respondent.

The driver of an automobile should use reasonable care in its operation according to place and presence of other travelers. Indiana Springs Co. v. Brown, 165 Ind. 465, 1 L.R.A.(N.S.) 238, 74 N. E. 615, 6 Ann. Cas. 656, 18 Am. Neg. Rep. 392.

Facts testified to from personal observation are not conclusions. 2 Jones, Ev. p. 805; Betts v. Chicago, R. I. & P. R. Co. 92 Iowa, 343, 26 L.R.A. 248, 60 N. W. 623; Kelleher v. Keokuk, 60 Iowa, 473, 15 N. W. 280; Smalley v. Iowa P. R. Co. 36 Iowa, 571; Ferguson v. Davis County, 57 Iowa, 601, 10 N. W. 906; Funston v. Chicago, R. I. & P. R. Co. 61 Iowa, 452, 16 N. W. 518; Baltimore & O. R. Co. v. Rambo, 8 C. C. A. 6, 16 U. S. App. 277, 59 Fed. 75; Winter v. Central Iowa R. Co. 80 Iowa, 443, 45 N. W. 737.

The court's charge to the jury on the matter of dangers natural to the use of automobiles was proper. The charge must be considered in its entirety. House v. Cramer, 134 Iowa, 374, 10 L.R.A.(N.S.) 655, 112 N. W. 3, 13 Ann. Cas. 461; Wolfe v. Des Moines Elevator Co. 26 Iowa, 659, 98 N. W. 301, 102 N. W. 517; Shinkle v. McCullough, 116

Ky. 960, 105 Am. St. Rep. 249, 77 S. W. 196, 15 Am. Neg. Rep. 63; Knight v. Lauier, 69 App. Div. 454, 74 N. Y. Supp. 999, 12 Am. Neg. Rep. 157.

What defendant should have done, or should not have done at the time of the accident, is a question for the jury in determining the question of ordinary and reasonable care. Christy v. Elliott, 216 Ill. 31, 1 L.R.A.(N.S.) 215, 108 Am. St. Rep. 196, 74 N. E. 1035, 3 Ann. Cas. 487; Murphy v. Wait, 102 App. Div. 121, 92 N. Y. Supp. 253; Thies v. Thomas, 77 N. Y. Supp. 276; Mahoney v. Maxfield, 102 Minn. 377, 14 L.R.A.(N.S.) 251, 113 N. W. 904, 12 Ann. Cas. 289.

Court has the right to call the jury's attention to the amount they may give, under the pleadings. Ladd v. Witte, 116 Wis. 35, 92 N. W. 365; Trumble v. Happy, 114 Iowa, 624, 87 N. W. 679.

Where there is evidence of probable permanent injury, the question is properly submitted to the jury. Ashley v. Sioux City, — Iowa, —, 93 N. W. 303; Cotant v. Boone Suburban R. Co. 125 Iowa, 46, 69 L.R.A. 982, 99 N. W. 115, 16 Am. Neg. Rep. 26; Westercamp v. Brooks, 115 Iowa, 159, 88 N. W. 372; Wimber v. Iowa C. R. Co. 114 Iowa, 551, 87 N. W. 505; McCord v. Minneapolis, St. P. & S. Ste. M. R. Co. 96 Minn. 517, 105 N. W. 190; Ladd v. Witte, 116 Wis. 35, 92 N. W. 365.

Theories cannot be submitted to juries as proper questions for their consideration, unless supported by competent evidence. Smith v. Sedalia, 152 Mo. 283, 48 L.R.A. 711, 53 S. W. 907; Sprague v. Fletcher, 69 Vt. 69, 37 L.R.A. 840, 37 Atl. 239; State v. Coleman, 186 Mo. 151, 69 L.R.A. 381, 84 S. W. 978; Mitchell v. Charlestown Light & P. Co. 45 S. C. 146, 31 L.R.A. 577, 22 S. E. 767; Christy v. Elliott, 216 Ill. 31, 1 L.R.A.(N.S.) 215, 108 Am. St. Rep. 196, 74 N. E. 1035, 3 Ann. Cas. 487.

It is not error to refuse requested instructions, when questions involved are covered by general instructions. Burdict v. Missouri P. R. Co. 123 Mo. 221, 26 L.R.A. 384, 45 Am. St. Rep. 528, 27 S. W. 453; Western Assur. Co. v. J. H. Mohlman Co. 40 L.R.A. 561, 28 C. C. A. 157, 51 U. S. App. 577, 83 Fed. 811; Savannah, F. & W. R. Co. v. Daniels, 90 Ga. 608, 20 L.R.A. 416, 17 S. E. 647; Harris v. United States, 8 App. D. C. 20, 36 L.R.A. 465; Denver & R. G. R. Co. v. Roller, 49 L.R.A. 77, 41 C. C. A. 22, 100 Fed. 738.

Goss, J. Defendant appeals from an order denying a motion for new trial. Plaintiff recovered a verdict for $800, based upon injuries caused by the horse he was driving becoming frightened at an automobile owned and operated by defendant. The accident occurred on a level prairie where both parties had plenty of opportunity to avoid trouble. The road was of the usual four rods in width, with no embankments, and with plowed fields on either side. The immediate cause of the injury was the dashboard and front of the single buggy giving way when plaintiff attempted to control his horse, allowing him to slide forward into a dangerous position, immediately behind and almost against the animal. He sustained an injury to his leg, for which he has asked judgment for $3,200, made up of items of $2,000 for damages because of pain and injury suffered, $1,000 special damages for loss of time, and $200 special damages for medical attendance and treatment. The jury allowed a lump sum of $800.

Defendant, Bruening, had shortly before the accident been at the house of one Albus, situated about a half mile west of the main north and south highway. In coming from the house he had approached the highway from the west, and, upon reaching it, turned south, and had gone some distance, variously stated by witnesses to be from no distance at all to a mile, when he discovered that the radiator of the automobile needed water, and because of which he turned around to go back to the Albus place to fill it. He had two ladies in the car. One of them, who had often driven this automobile, was driving. Soon afterwards the two vehicles met while plaintiff was going south and defendant north on the level highway. When defendant had reached the highway coming from the Albus place, and first turned south, the plaintiff, who was also going south, was several hundred feet north of the point where defendant came into the highway. The defendant had driven the automobile, a two-seated Buick machine, for two years and was an experienced driver. The plaintiff was driving a young horse hitched to a single buggy. The accident occurred on the 8th of May, 1910. Plaintiff had purchased the horse and buggy in March of that year. His wife was with him. Both plaintiff and defendant lived in Carrington, and the accident occurred about 6 miles south of that place, defendant having, on the way out to the Albus place, overtaken and passed the plaintiff some little time previously.

The accident occurred in broad daylight. The distance between the two approaching vehicles from the time defendant turned around to go back for water is variously placed at from a mile to less than a block. The plaintiff testifies that he was about 500 feet to the north of the point where defendant entered the highway on turning south coming from Albus's place. As the accident occurred some distance south of such point, the automobile must have gone a considerable distance south before turning, to have given plaintiff the time to drive the 500 feet and such additional distance as he was past the intersection of the road coming from the farmhouse with the highway. Had plaintiff not been south of this intersection, defendant would not have met him while returning, as he was, to the Albus house. During this time defendant was traveling southward, as he states, at a speed of from 15 to 18 miles an hour, and so constantly increasing the 500-foot distance intervening between plaintiff and the machine when the machine turned into the highway and went south. The only possible reasonable conclusion from the evidence is that the automobile had traveled southward to such a distance after it turned into the highway, and that at the time of turning around to return for water defendant was so far distant from the plaintiff's rig that no negligence can be predicated upon either the fact of the turning or the manner in which it was done, or upon any noise or smoke, so-called, from the machine at that point in the occurrences. Any negligence in the case, then, must have occurred later, as the parties approached or passed each other. Concerning this the testimony of all witnesses (including the plaintiff himself), except the testimony of the wife of the plaintiff, establishes that as the vehicles approached one another the machine left the beaten track, turned to the right nearly to the extreme edge of the road close to the plowing, leaving a rod or more intervening between it and the beaten track upon which plaintiff kept his horse; plaintiff meanwhile made no effort upon the approach of the automobile to turn to the right or in any way to avoid accident. This he admits, giving as a reason that he had no time to do so because of the speed at which the automobile approached him. There is competent testimony that as the vehicles approached one another plaintiff's wife threw up her hands and called for defendant to stop. Whether the machine stopped at once is in conflict, but the preponderance of the evidence is to the effect that it did, while the jury

in finding this verdict must have found that it did not. The defendant and another occupant of the car testified positively that the car was stopped at once. A bystander testifies to seeing it standing still there. And we understand plaintiff's testimony to admit that it stopped. Speaking of the automobile, he says: "It came close, and had to stay, and the horse started to jump." Whether it stopped or not, the plaintiff, for some reason, turned his horse to his left and toward the side from which the automobile was approaching, and while the automobile was on the outside of the highway the horse dashed in front of it eastward, into the plowed field. While on the field, in attempting to stop the animal, the plaintiff placed his feet against the dashboard, which gave way, letting him out almost upon the horse. He then lost hold of the left rein, retaining the right one, causing the horse to immediately circle to his right some 150 or 200 feet, going from the east field across the road into the west one, at which place plaintiff's wife, who had fallen out of the rig in the field, met the horse, stopped it, unhitched, released her husband from his predicament, rehitched the horse to the buggy, and both drove on. The rig was not upset, and doubtless no injury would have resulted to either of the occupants had not the front of the single buggy given way.

Defendant is charged with negligence in approaching at a dangerous and unreasonable rate of speed, making an unusual and loud noise with the machine, causing it to emit and throw out great clouds of smoke, running it without a muffler attached, needless blowing of the horn, whistle, or trumpet on approaching, making unnecessary noise to frighten the horse, failure to stop the machine when the horse was observed to be frightened, failure to stop on command of the plaintiff, and wanton negligence in making unnecessary noise with the machine and its whistle or trumpet, and in running the machine in too close proximity to the plaintiff's horse so as to make it unmanageable,—all to the injury of the plaintiff resulting therefrom. On the proof it develops that any negligence on the defendant's part in this case must be found elsewhere than in any violation of statute by failing to stop the machine when requested to do so, as plaintiff, the driver of the horse, did not signal to defendant to stop. The whistle or trumpet described in the complaint is reduced by the testimony to the ordinary rubber bulb horn.

Four of defendant's assignments of error concern the admission of testimony. We have examined them carefully, and consider them not well taken. The remaining assignments concern the instructions. The court gave a lengthy instruction, entirely in the abstract, and upon the whole strongly favorable to the plaintiff. The appellant complains of the refusal of the court to give the following instruction:

"In this case it is the contention of the defendant that at the time he was approaching the plaintiff on the highway where the accident took place, that he had turned to the right-hand side of the road, out of the traveled track, and was approaching the plaintiff and his horse at a reasonable rate of speed; and that as soon as he observed that the plaintiff's horse was becoming frightened he immediately stopped his automobile, and that thereupon the plaintiff's horse shied to the right of the defendant and went around the automobile. I charge you that if you find from the evidence in this case that the defendant is correct in his contentions, then he was using and exercising toward the plaintiff all the caution imposed by law; and if you so find from the evidence and the facts surrounding this case then your verdict should be for the defendant."

This requested instruction omitted to include a statement covering diligence and care on the part of defendant to observe any fright of the plaintiff's horse. In other words, defendant could have been negligent in failing to have promptly observed the animal if frightened, and continued on his way until he actually observed it, while in the exercise of prudence he should have observed the fright and stopped the automobile before he did. The requested instruction does not cover this feature of the approach, concerning which defendant may have been negligent, and all the facts be true mentioned in the request. Hence the court properly refused it.

But such requested instruction did bring to the attention of the court one element of the case on which the jury are not informed by the court's instructions, and that is under what specific circumstances they should exonerate defendant from negligence if they found he did stop his automobile after turning out of the traveled track to the right edge of the road. The facts were not complicated. The evidence was not voluminous. To have instructed upon this point would have been a simple matter. The court need not have invaded the province of the

jury in doing so, and the jury should have been instructed on defendant's contention under his theory of the facts by an instruction after such endeavor to obtain it by the request made. While the court properly refused the requested instruction, he did not cover defendant's theory of defense.

Defendant excepts to the following instruction given: "If ordinary care or prudence required Henry Bruening to do some particular thing which he failed to do upon this occasion, then he is guilty of negligence."

This instruction is justly subject to criticism. It left the jury to speculate as to whether Henry Bruening failed "to do some particular thing," within or without the evidence, which the jury might infer, surmise, imagine, or conclude to be negligence, or whether the same was one of the many acts of negligence specified in the complaint or covered by it. Besides, it in effect held the defendant responsible for any act the jury might have inferred was a negligent act, whether the same was or was not the proximate cause of the injury.

It is true that this instruction follows a proper general instruction upon negligence. Immediately following in the same paragraph, the court gave the instruction excepted to which could not have been other than prejudicial under the pleadings and the circumstances shown by the proof. It was followed with this direction of the court: "With these general statements of the law you will inquire, first, whether the defendant was or was not negligent upon the occasion referred to." With the jury following this direction, it is but natural that some or all of the jurors, in scanning the testimony to determine defendant's negligence, may have found sufficient to convict him of negligence because he failed to alight from his automobile and escort this horse past the machine, notwithstanding plaintiff testifies he (plaintiff) was driving in the track, making no effort to turn out and momentarily coming in closer proximity to defendant's machine. No apparent necessity for alighting and assisting plaintiff may have existed, yet defendant may be held for that as an act of negligence as the basis for the verdict, though the complaint does not, either specifically or with reasonable inference, include as an act of negligence such an omission to assist the plaintiff. And this very omission to assist, not plead as negligence, is one of the things most probable for the jury to have seized

upon as an act of negligence which was left to them to consider, and which they might have concluded was all-sufficient upon which to base their verdict under the specific instruction complained of. Defendant has excepted to this instruction and briefed error upon it. He says the jury "is not confined to the evidence or any fact which the plaintiff claimed resulted to his injury." This brings to our attention the question of whether the omission, in the instruction excepted to, to instruct that the particular thing constituting negligence must have contributed to the injury complained of, conceding that the instruction is otherwise proper, is waived by proper instructions elsewhere in the charge upon proximate cause. Upon careful examination of the entire charge we find proximate cause is not mentioned except in connection with two specific matters of negligence set forth in the complaint. The court omitted to instruct the jury of the necessity, before plaintiff's recovery, that the jury should find that any negligence or negligent acts of the defendant must have been the proximate cause of the accident, or the fright to plaintiff's horse, or the injuries sustained resulting therefrom. Instead, the jury are instructed: "Before the plaintiff can recover in this action he must satisfy you by a fair preponderance of the evidence that the defendant was guilty of negligence in handling and operating the automobile upon the highway at the time and place described in the complaint. And the burden of proof is also upon the plaintiff to establish by a fair preponderance of the evidence the amount of damages which he has sustained." And again: "Therefore, in order that the plaintiff can recover in this action he must establish to your satisfaction by a fair preponderance of the evidence that the defendant was guilty of negligence." And then again: "So, if you shall be of the opinion that the defendant was negligent, you will pass to the question, Was the plaintiff guilty of negligence?" Then, again, at the close of the instruction upon negligence, we find the following: "There are two main questions for you to consider in this case, determinative of the defendant's liability, Was the defendant negligent? If he was, then the plaintiff will be entitled to recover at your hands. On the other hand, if the defendant either was not negligent, or if the plaintiff was guilty of contributory negligence, then the plaintiff will not be entitled to recover." Immediately after which the court instructed upon damages. These excerpts from the opinion illus-

trate the entire omission of the court to instruct upon proximate cause, the consideration of which is involved in this instruction excepted to, inasmuch as the instruction excepted to is also faulty because of such omission concerning proximate cause. Defendant has not excepted to all of these instructions, nor has he assigned error because proximate cause was not defined to the jury, but its consideration is raised in determining the propriety of this faulty instruction, wherein the jury were instructed: "If ordinary care and prudence required Henry Bruening to do some particular thing, which he failed to do upon this occasion, then he is guilty of negligence." It may be urged that the defendant could not have been negligent in the occurrences in evidence without such negligence having been the proximate cause of the accident. Our reply would be that this was a question of fact for the jury, not a question of law for the court; and to hold as a proposition of law that it is unnecessary to instruct upon proximate cause, in an action to recover for defendant's negligence, wherein contributory negligence also is plead, is the equivalent of holding defendant liable for negligence whether a proximate or remote cause of the injury. And such were the instructions of the trial court. It is elementary that without proof that negligence is the proximate cause of an injury, negligence is not actionable. And the facts illustrate the necessity for an instruction upon proximate cause, as the jury may have, within the evidence and also within the charge of negligence laid in the complaint, and following instructions, found that when defendant turned his automobile north, perhaps a quarter of a mile in front of plaintiff's horse, that he might there have done some negligent act, which in itself could not have been a proximate cause of the accident occurring some minutes later from a different cause. But yet, under an instruction informing the jury that the only questions in the case were defendant's negligence and plaintiff's contributory negligence, in effect that if defendant was negligent and plaintiff was not, plaintiff should recover, a recovery may have been awarded upon defendant's remote negligence. Hence the true issues of law and fact were not submitted to the jury. But, in the absence of any instruction upon proximate cause, such was the only meaning to be given to the instructions: "These are the two main questions for you to consider in this case, determinative of defendant's liability. Was the defendant negligent? If he was, then was the plain-

tiff guilty of contributory negligence? If he was not, then the plaintiff will be entitled to recover at your hands." When construed with the particular instruction excepted to and under discussion it is impossible to sustain this recovery for two reasons,—first, the verdict may have been rendered on negligence not plead; and, second, if upon negligence plead, the verdict may be based upon negligence not the proximate cause of the injury, and therefore negligence not actionable. A new trial therefore must be granted.

Defendant also requested the following instruction, which was refused, upon which error is assigned: "The law imposes an equal degree of care, prudence, and caution upon both the plaintiff and defendant in this case. If at the time the plaintiff met the defendant he was driving a horse which would become frightened or shy upon approaching an automobile, or if the plaintiff had reasons to believe that the horse he was driving would become frightened or shy at an automobile that was approaching him in a careful, proper manner, then the law required the plaintiff to use the care and prudence that a reasonably prudent man would have used under similar circumstances to avoid injury. This would require that the plaintiff should turn his horse out of the traveled highway, to the right, a reasonable time before meeting such automobile; also to signal by raising his hand in time so as to apprise the defendant of the fact that he was driving a horse of such disposition."

That portion of the request stating that the law requiring that plaintiff should turn his horse out of the traveled highway, to the right, at a reasonable time before meeting such automobile, may be a matter for the jury, and not for the court, to determine; and because thereof the instruction requested was properly refused. But the latter part of the requested instruction brings up the statutory duty of the plaintiff to signal if he desired defendant to stop the automobile, and under which defendant in his brief urges: "The law required that this signal be given so as to attract the attention of the driver of the automobile, and the signal must be given by the driver of the horse. It is not enough that this signal should be given by someone who happened to be in the rig."

Inasmuch as this is but a portion of an instruction properly refused, we could conclude a discussion of this subject by the simple statement

that the requested instruction as a whole contained matter improper to be given, and that if improper for any purpose it was for all, and refuse to consider that portion of the instruction raising the question of whether a signal to stop given by an occupant, instead of a driver, of an animal-drawn vehicle, to the driver of an automobile, is a sufficient signal under the statute. In other words, whether defendant was obliged under the statute to stop the automobile on the signal of the occupant of the rig, or be guilty of a misdemeanor and perhaps negligence *per se* for violation of this statutory command to stop when signaled by the driver of the approaching animal-drawn vehicle. But a new trial is necessary for reasons heretofore given.

The complaint seeks damages both for common-law negligence and for negligence based upon an alleged statutory duty for failing to stop when signaled. The complaint in such respect alleges: "And that this plaintiff, when a reasonable distance from said automobile, signaled the said defendant to stop the said automobile," which defendant failed to do, resulting in injuries complained of and sued for. The court in its instructions treated the action as in part a recovery sought for negligence resulting from a violation of the statute in question. The jury were instructed: "If the plaintiff in this action signaled the defendant to stop his automobile at any time when the automobile was approaching his horse, it was his duty to stop it as soon as he reasonably could in the exercise of ordinary care; and injuries resulted because he failed to do that, then he would be liable to the plaintiff in this action. He would, in other words, be guilty of negligence."

No proof of the disregard of the statute is in the case unless it be assumed, as did the court on the trial, that the exclamations of the wife and the signals given by her be considered the same as though given by plaintiff. And this raises the question whether an occupant of a vehicle is a driver within the meaning of our statute, § 2173, Rev. Codes 1905, as amended by chap. 42 of the Laws of 1909. This question apparently will be necessarily involved in a new trial, as at no place does plaintiff testify or claim that he personally gave any signal to the motorist to stop. Instead he testifies as follows:

Q. When you saw them turning around in the road, what did you do?

A. Did not do anything. . . . I drove slowly. I drove it right along to meet the automobile on the right-hand side of the road. I was right in the road on the main track. It came close and had to stay, and the horse started to jump.

Concerning the signal, his wife's testimony is:

I know Henry Bruening could see us all the time. I knew the law was to put up your hands and stop an automobile. I knew it at that time. I know what you mean by the law. It is to raise my hands. The law says when an automobile comes you ought to raise your hands.

Q. Who told you that?

A. I know what people ought to do in passing and driving automobiles; I knew that was the law.

Q. So you raised your hands?

A. You bet. I raised my hands, and if he was not blind he could see.

Our statute, said chapter 42, provides:

"The driver or operator in charge of any automobile or motor cycle on any public road or highway outside the limits of any town, village, or city within this state, when signaled by the driver of any vehicle propelled by horses or other animal power, which signal shall be given by raising the hand or in such other manner as to attract attention, shall stop said automobile or motor cycle until the vehicle propelled by said animal power has passed; and if approaching said vehicle from behind, the driver or operator in charge of said automobile or motor cycle shall stop for a reasonable time, and the driver of said animal-propelled vehicle shall, as soon as the condition of the road will permit, turn to the right and allow at least one half of the road on his left for the passage of said automobile."

The penalty for violation of this statute by either driver may be fine and imprisonment, "and the person so offending shall be liable in a civil action for damages to any person who shall have been injured, in person or property, by reason of such violation." This penal statute must be given such construction as will give effect to the legislative intent; yet there is nothing in the statute, in express terms or by reasonable or necessary inference, to authorize the statutory signal to be given by

one other than the driver of the animal-drawn vehicle. Stripped of unnecessary terms it reads:

"The driver . . . of any automobile . . . when signaled by the driver of any vehicle propelled by horses . . . shall stop said automobile . . . until the (horse-drawn vehicle) . . . has passed."

The companion portion of the statute provides that the driver of an animal-propelled vehicle, approached from behind by an automobile, shall turn to the right and allow one half of the road for the passage of the automobile. The failure to obey this law of the road in such particulars constitutes, in either case, a misdemeanor. But the criminal and civil responsibility is placed solely upon the drivers of the respective vehicles. No occupant other than a driver can be held in either case civilly or criminally responsible as for violation of this statute. The driver is named as the responsible party required to signal, and whose signal is required to be noticed by the other driver; and thus by necessary implication the right of any other person, occupant, or bystander to give the statutory signal is excluded. And this is so for good reasons. The plaintiff is the person who was responsible for the manner in which this horse was controlled. It is his negligence or contributory negligence for which he is held responsible. It is his horse. As an owner he is presumed, in law and in fact, to know it and its characteristics, habits, and disposition, gentleness or viciousness, better than any other person, and sense more fully and quickly than any occupant of the rig an actual dangerous situation. He knows, or is presumed to know, when he has control of the animal. He, as a driver, is required to exercise care and diligence in driving at this as in all similar situations. And he, upon whose acts safety depends, it not depending upon any occupant of the rig, is charged with knowledge of the law and the duty to act with reference thereto. He must know that the automobile driver must look to him, as the person in control of his part of the situation, as the proper person to and charged with the duty of giving the warning signal, and until such warning is given by signal, shouting or otherwise, the automobile driver had the right to assume it was unnecessary to stop, so long as he was using due care and ordinary caution not to frighten the horse in passing upon the meeting of such vehicles. In other words, until the driver of the horse shall give the statutory

signal, it is not given in fact or law, even though an occupant or occupants of the horse-drawn vehicle may, on their own initiative, signal the automobile to stop. The testimony of the wife, above quoted, furnishes the best of reasons for our conclusions. Every motorist has probably experienced, on numerous occasions, similar exclamations, show of hands, and signals from the rear seat of a horse-drawn vehicle, while the driver at the same time signals the automobile to proceed. Mrs. Messer's testimony is that she began to signal as the automobile was turning, and the physical facts, under even her own testimony, liberally construed in her favor as the party giving it, establish that from 500 feet to a quarter or possibly half a mile intervened between the two rigs when the automobile turned around to return to the Albus place and when she says she began signaling. The only conclusion must be that if the plaintiff's wife did signal defendant, by waving her hands when he turned back north, it would be absurd to say that the legislature ever meant to place the right to signal under such circumstances upon this occupant of a rig who, if the signal made be held to be a statutory signal as claimed, thereby made a disregard of it by an automobile driver, even at such a distance, a crime, granting that her testimony is correct that he must have seen it had he not been "blind." It may be urged that at times the driver of a rig may be so engaged with the control of the horse as to be unable to signal. This might be true if the only way he could signal was to raise his hand, but a signal given by shouting is a signal under the statute, providing "that it may be given in such other manner as to attract attention." No hardship in any event lies upon the driver, who should not be afforded opportunity to fail to himself signal, to hazard upon his ability to drive his fractious, unruly horse, equally dangerous as the auto to traffic, by the motor; and when he fails, complaint that it was the entire fault of the motorist, and mulct him for damages, because some nervous, irresponsible, aged person riding with him has, perhaps without apparent good cause, raised her hands or screamed, which he may seek to claim, as here, has established negligence *per se*. Besides, the legislature has not said that the statutory signal must be given or no right of action for damages will lie. In each case it usually must go to the jury under proper instructions. As no statutory signal was given to the driver of the motor vehicle to stop, no liability based upon a failure to comply with

chapter 42 is shown. In support of our conclusions, see Mahoney v. Maxfield, 102 Minn. 377, 14 L.R.A.(N.S.) 251, 113 N. W. 904, 12 Ann. Cas. 289. This case is under a statute very similar to ours. The trial court instructed that such a statute, framed in general words, made it the duty of the motorist to stop his motor, and that stopping the machine was not enough. On appeal the instruction was held erroneous, the court refusing to enlarge the statute by construction. The supreme court of Kansas in an opinion filed April 12, 1913, on all fours with this case, exonerates the motorist under a more stringent statute than ours with closer facts. See Sterner v. Issett, 89 Kan. 357, 131 Pac. 551. Accordingly we hold that the legislature knew what they desired to say, and said exactly what they meant when they required the signal to come from the driver, and from no one else. To hold otherwise would be to distort plain language and to judicially legislate. State v. Goodwin, 169 Ind. 265, 82 N. E. 459, apparently is contrary to our holding, but upon inspection it will be noticed that the statute there construed was much broader than ours, and probably required the construction there given.

Other instructions given the jury to which exception is taken are "but on account of the fact that an automobile is a somewhat novel means of transportation over public highways, and on account of the fact that it appears strange to the ordinary horse, makes an unusual noise, there are certain duties which the driver of an automobile should observe peculiar to the character of the instrumentality which he uses." Counsel for appellant has excepted to this as an unwarranted assumption of fact in stating as facts certain matters to the jury not in evidence, and that the court has assumed that an automobile is a novel means of transportation, and that it appears strange to the ordinary horse, and makes an unusual noise. He urges that as one of the matters of negligence charged in the complaint is the unusual noise so made, the assumption of it as a fact by the court was prejudicial error. Such instructions have been held proper in the early automobile cases. Counsel for respondent cites many of them, among which are Indiana Springs Co. v. Brown, 165 Ind. 465, 1 L.R.A. 246, 74 N. E. 615, 6 Ann. Cas. 656, 18 Am. Neg. Rep. 392; Christy v. Elliott, 216 Ill. 31, 1 L.R.A. (N.S.) 215, 108 Am. St. Rep. 196, 74 N. E. 1035, 3 Ann. Cas. 487; Shinkle v. McCullough, 116 Ky. 960, 105 Am. St. Rep. 249, 77 S. W.

196, 15 Am. Neg. Rep. 63. These, like all other authorities, must be read in the light of contemporaneous events and of the knowledge had at that time of the gasolene motor, and of the present-day knowledge of its subsequent development. The automobile has been perfected and brought to its present general use within the last ten years. Historians may properly characterize this as the period of the development of the internal combustion motor. A reading of some of the cases cited by counsel for the respondent is interesting in illustrating the trouble there taken to minutely describe an automobile. The wonder is not at the unanimity with which, in these cases, findings of negligence are affirmed with scant proof of actual negligence on the part of the motorist, as courts apparently were as far from indulging in any leniency toward "devil wagons" as were the juries in passing *pro forma* upon the fact of negligence of the motorist. No reason exists to longer make the automobilist an insurer in fact against damages resulting from such accidents. In theory they were not, but in practice they were, such insurers. The present-day automobile is a nearly perfect piece of machinery, to the use of which farm horses have long since become accustomed. The fact that about 10,000 are registered in this state alone is ample proof of that. They are no longer to be termed novel, and they do not make an unusual noise. The instruction proper to give in early cases should no longer be approved. When the reason for a rule ceases the rule itself should cease.

Whether any negligence as charged in the complaint has been shown we do not decide. Inasmuch as no motion for a directed verdict was made, both counsel assuming that there was sufficient evidence to warrant the submission of the issue of negligence to the jury, we have assumed, without deciding, that there is some substantial evidence of negligence.

Exceptions have been taken to the measure of damages, but it is unnecessary to pass upon them. The judgment appealed from is set aside and the case remanded for further proceedings, appellant to recover costs on this appeal. It is so ordered.

Fisk, J. (dissenting). I am unable to concur in the views of the majority. The verdict concededly has ample support in the evidence, and from my view point no substantial or prejudicial error was com-

mitted by the trial court in its instructions to the jury or otherwise. I refrain from setting forth *in extenso* my views on the law points presented, as no useful purpose would be thereby subserved. Suffice it to say that in my opinion the judgment should be affirmed.

E. I. DONOVAN v. CORNELIUS JORDAN.

(142 N. W. 42.)

Opinions deciding three cases on appeal, as numbers 2387-88 and 89. Plaintiff began these three actions, all of same title, on September 21, 1901, October 9, 1901, and October 4, 1902, respectively, and they were placed upon the trial calendar in 1901 and 1902, respectively. In November, 1902, plaintiff filed affidavits of prejudice against the judge of that district. No further action was taken until December 16, 1907, when defendant filed motions to dismiss, based upon § 6999, Rev. Codes 1905, for failure to prosecute to trial for over five years, which motions were heard by another judge there presiding, and denied, after which trial was had over defendant's exception, and judgments were awarded in plaintiff's favor. On defendant's appeal it is *held*:

Affidavit of prejudice — failure to bring action to trial — judge — presumption — delay.

(1) That the affidavit of prejudice was insufficient to exonerate plaintiff from the neglect presumed under the statute from his failure to cause the cases to be brought on for trial during the period of more than five years after the filing of such affidavits; and that the presumption that the resident judge did his duty and called in another judge to hear the cases, or attempted to do so, will not operate to excuse such long-continued delay. And such delay is chargeable to plaintiff, in the absence of any showing of excuse on his part.

Action — failure to prosecute — motion to dismiss — affidavits — sufficiency — uncontroverted.

(2) That the facts disclosed by the record and the affidavits supporting defendant's motions to dismiss, being wholly uncontroverted, were sufficient to entitle defendant to dismissals as of right under said statute.

District court — discretion — abuse of — reversible — orders.

(3) That § 6999 applies, there being no facts upon which discretion to deny defendant's motion can be based. Such denials were, therefore, an abuse of discretion reviewable on this appeal.

Opinion filed May 24, 1913. Rehearing denied June 19, 1913.

From orders denying dismissal, defendant appeals. Reversed, and the judgments subsequently entered, directed to be vacated and the three actions ordered dismissed.

An appeal from District Court for Cavalier County, *Allen,* Special J.

Joseph Cleary, for appellant.

The defendant's motion to dismiss the action should have been granted, as a matter of right. The statute is mandatory. Rev. Codes 1905, § 6999; Lambert v. Brown, 22 N. D. 107, 132 N. W. 781.

The court erred in allowing plaintiff's motion to amend his complaint. The mere order allowing an amendment is of no effect until it is complied with. Satterlund v. Beal, 12 N. D. 122, 95 N. W. 519.

W. A. McIntyre and *Geo. M. Price,* for respondent.

In cases involving the judicial discretion vested in trial courts, their action will not be disturbed, unless it clearly appears that there is an abuse of such discretion. Minnesota Thresher Mfg. Co. v. Holz, 10 N. D. 16, 84 N. W. 581; Keeney v. Fargo, 14 N. D. 419, 105 N. W. 92; Cline v. Duffy, 20 N. D. 525, 129 N. W. 75; Racine-Sattley Mfg. Co. v. Pavlicek, 21 N. D. 222, 130 N. W. 228.

The presumption is that public officers do as the law and their duty require them. Pine Tree Lumber Co. v. Fargo, 12 N. D. 360, 96 N. W. 357.

Courts favor the trial of actions upon their merits. Citizens' Nat. Bank v. Branden, 19 N. D. 489, 27 L.R.A.(N.S.) 858, 126 N. W. 102; Grady v. Donahoo, 108 Cal. 211, 41 Pac. 41.

Omission due to an act of an official without participation of plaintiff does not work a discontinuance. 6 Enc. Pl. & Pr. 926.

Or failure to hold a term of court. Carlisle v. Gaar, 18 Ind. 177.

Defendant, by appearing and taking part in the trial, waived any error in former proceedings of the trial court, in not dismissing the actions. Grand Pacific Hotel Co. v. Pinkerton, 217 Ill. 61, 75 N. E. 435; Prall v. Hunt, 41 Ill. App. 140; Herrington v. McCollum, 73 Ill. 476.

Right of dismissal is waived by acts of defendant recognizing the action still in court. 6 Enc. Pl. & Pr. 962.

The allowance of amendments to pleadings is discretionary, and will not be disturbed except in cases of clear abuse. Paulsen v. Modern Woodmen, 21 N. D. 242, 130 N. W. 231.

Amendments to correct mere clerical errors are allowed almost as of course. It is reversible error to refuse them. 1 Enc. Pl. & Pr. 557, 558–598; Chandos v. Edwards, 86 Wis. 493, 56 N. W. 1098; Bank of Havana v. Magee, 20 N. Y. 355; Rev. Codes 1905, § 6883.

The amendment did not mislead the defendant, nor did it change the cause of action. The variance in pleading and proof, if any, was immaterial. Rev. Codes 1905, §§ 6879–6886; Ashe v. Beasley, 6 N. D. 191, 69 N. W. 188; Iverson v. McDonnell, 36 Wash. 73, 78 Pac. 202; Wilcox & W. Organ Co. v. Lasley, 40 Kan. 521, 20 Pac. 228.

Where amendment is allowed, and the case proceeds as though it had been made, the necessity for making it is obviated. Brantz v. Marcus, 73 Iowa, 64, 35 N. W. 115; Kuhn v. Gustafson, 73 Iowa, 633, 35 N. W. 660; Johnston v. Farmers' F. Ins. Co. 106 Mich. 96, 64 N. W. 5; Crester v. Cary, 52 Wis. 374, 9 N. W. 161; Lyon v. Brown, 6 Baxt. 64; Hoffman v. Keeton, 132 Cal. 195, 64 Pac. 264; Hawkes v. Davenport, 5 Allen, 390; Excelsior Mfg. Co. v. Boyle, 46 Kan. 202, 26 Pac. 408; Ashe v. Beasley, 6 N. D. 191, 69 N. W. 188; Rev. Codes, 1905, §§ 6879, 6886.

A legal presumption, or the legal effect of a written contract, cannot be changed or contradicted by parol evidence. Rev. Codes 1905, § 5333; Reeves & Co. v. Bruening, 13 N. D. 157, 100 N. W. 241; Merchants' State Bank v. Ruettell, 12 N. D. 519, 97 N. W. 853; Sargent v. Cooley, 12 N. D. 1, 94 N. W. 576; First Nat. Bank v. Prior, 10 N. D. 146, 86 N. W. 362.

A party to a written contract is ordinarily estopped to deny its recitals. 16 Cyc. 686–721; 11 Am. & Eng. Enc. Law, 392.

An extension of time of payments is a sufficient consideration to support a chattel mortgage. 6 Cyc. 1012; Fuller v. Brownell, 48 Neb. 145, 67 N. W. 6; Sinker v. Green, 113 Ind. 264, 15 N. E. 266.

A contract should be construed so as to make it a legal document, rather than one contrary to law and public policy, if reasonable. United States v. Central P. R. Co. 118 U. S. 235, 30 L. ed. 173, 6 Sup. Ct. Rep. 1038; Hobbs v. McLean, 117 U. S. 567, 29 L. ed. 940, 6 Sup. Ct. Rep. 870; Lorillard v. Clyde, 86 N. Y. 384; Ormes v. Dauchy, 82 N. Y. 443, 37 Am. Rep. 583; 9 Cyc. 586; Rev. Codes 1905, § 5347; Young v. Metcalf Land Co. 18 N. D. 441, 122 N. W.

1101; Braithwaite v. Jordan, 5 N. D. 243, 31 L.R.A. 238, 65 N. W. 701; Bache v. Coppes, C. & M. Co. 35 Ind. App. 351, 111 Am. St. Rep. 171, 74 N. E. 41; New Memphis Gaslight Co. Cases, 105 Tenn. 268, 80 Am. St. Rep. 880, 60 S. W. 206.

Chattel mortgage covering partly present and partly future property, though void as to the latter, is good as to the former. 6 Cyc. 1052; Gardner v. McEwen, 19 N. Y. 123; Van Heusen v. Radcliffe, 17 N. Y. 580, 72 Am. Dec. 480; Wadsworth v. Owens, 17 N. D. 173, 115 N. W. 667; Angell v. Egger, 6 N. D. 391, 71 N. W. 547; Grand Forks Nat. Bank v. Minneapolis & N. Elevator Co. 6 Dak. 357, 43 N. W. 806; Rule XIV, Supreme Court, 10 N. D. xlvi, 128 N. W. xiii; Pendroy v. Great Northern R. Co. 17 N. D. 433, 117 N. W. 531.

Goss, J. The record facts decisive of all three of the above-entitled actions are practically identical. Judgment in each has been awarded against defendant after denial of a motion to dismiss made and based upon the provisions of § 6999, Rev. Codes 1905, providing for the dismissal where the action is not brought to trial or to final determination within five years from its commencement. Plaintiff has brought three actions against defendant upon three different causes of action, with complaints verified respectively September 21, 1901, October 9, 1901, and October 4, 1902, all of which were instituted by attorneys Gordon & Lamb, formerly of Langdon, North Dakota, both of whom are since deceased. Within the thirty-day period answer was served; and note of issue was filed in the first two cases in October, 1901, and in the last in November, 1902. Affidavits of prejudice against the trial judge, and bonds for expenses, were filed in all three actions by the plaintiff on November 11, 1902. The causes remained untried, with no action taken by either party, plaintiff or defendant, and no steps taken whatever, except that other attorneys for plaintiff were substituted during the interim, until December 16, 1907, more than five years after said actions had been placed upon the calendar, and more than that period after the filing of the affidavits of prejudice against the trial judge of that district. On December 16, 1907, defendant filed motions to dismiss, which were heard by the judge of another district there presiding. The motions were based upon the record and supporting affidavits of defendant and his attorney, to the effect that "the

plaintiff has neglected and did neglect for a period of five years after the commencement of said action to bring the same to trial and to take proceedings for the final determination thereof;" and that the delay has not been occasioned by or because of the defendant. No affidavits in rebuttal appear to have been served or filed. The presiding judge denied the motion for dismissal, "for the reason that affidavits of prejudice were filed in each of said actions, and the court will presume that the judge of the seventh judicial district did his duty or honestly attempted to do so, procuring or attempting to procure another judge to try said actions." To this order the defendant excepted, and on this appeal has assigned the same as error, contending that from the record, with the long delay unexcused and unexplained, under the statute, § 6999, Rev. Codes 1905, the action was deemed dismissed, and the court should have so ordered, instead of denying his motion and proceeding to trial. Plaintiff, in reply, urges that the affidavit of prejudice on file was a sufficient explanation of the delay if an excuse was necessary, and that the dismissal was discretionary with the court, and the court having exercised its discretion favorably to plaintiff by its denial of defendant's motion, its action should not be reversed on appeal except for clearly an abuse of discretion not here shown. Such are the arguments of counsel upon this question.

Since the trial court made the order in these cases on December 16, 1907, this court, in Lambert v. Brown, 22 N. D. 107, 132 N. W. 781, has had occasion to construe and apply § 6999, Rev. Codes 1905. It was there said that by operation of this statute "failure for five years after the commencement of an action to bring the same to trial creates a presumption of unreasonable negligence on the part of the plaintiff, entitling defendants to a dismissal of the action unless good cause for the delay be shown." And we there held that an order dismissing an action six years old was properly entered. The trial court, as is apparent from a portion of the order of dismissal above quoted, considered that the fact that an affidavit of prejudice against the presiding judge had been on file for more than five years was sufficient to exonerate plaintiff from neglect, under a presumption indulged that the regular presiding judge had been unable to procure an outside judge to try the causes. It may be that it will be presumed that said judge, upon the filing of the affidavits of prejudice, complied with the statute,

and procured or attempted to procure another judge to hear the cases, but we will not presume that for a period of five years it was impossible to obtain an outside trial judge to attend for such purposes. Rather would we presume that an outside judge was obtained, but that other reasons existed for the long delay. The records of this court, of which we are asked by counsel for appellant to take judicial notice, disclose that at different times in 1903 and 1904 judges of other districts were at various time at Langdon, presiding in said court. This is disclosed from the record before us in Barry v. Traux, the opinion in which case is reported in 13 N. D. 131, 65 L.R.A. 762, 112 Am. St. Rep. 662, 99 N. W. 769, 3 Ann. Cas. 191. Under the record in this case, and under such facts, we will not indulge in the presumption that the delay was occasioned by the judge of that district, in the absence of any showing that plaintiff was ever, during said period, ready for trial, and endeavoring in good faith to obtain a final determination of these causes. Nor do we determine that sufficient excuse would have been shown for apparent neglect in prosecution had plaintiff brought upon the record the fact of an endeavor on his part to thus procure a trial of these causes. Notwithstanding the affidavit of prejudice, any unreasonable delay is chargeable directly to plaintiff, as it has already been adjudicated in this state that litigants have a remedy by mandamus to enforce the procuring of an outside trial judge in case the disqualified resident judge, for any cause, neglects to procure one. See Gunn v. Lauder, 10 N. D. 389, 87 N. W. 999, wherein an original writ of mandamus from the supreme court was issued upon a showing of less than a year's delay in the procuring of another judge to act, after disqualification, by filing of an affidavit of prejudice against the resident judge.

Under these facts, then, no excuse appears why the failure to bring this case on for trial, within the period since its commencement exceeding five years, is not neglect within the terms of the statute. There was, then, no ground for the denial of the motion made.

But plaintiff avers that the denial was discretionary and should not be reversed except for an abuse of discretion. Under the facts shown there was no discretion vested in the trial court, as there were no facts brought before it upon which it could use discretion. The only determination to be made was whether a case coming within the explic-

it terms of § 6999, and for which the statute was passed, should be governed by the statute. We know courts are loath to dismiss on motion without trial on the merits, but the statute has said that it shall be done when the case falls within its terms, and this is such a case. And no discretion is therefore left, the duty of the court being only to dismiss. To hold otherwise is to nullify, disregard, and set at naught the expressed will of the legislature. If the statute does not here apply, it never applies, inasmuch as the facts are uncontroverted and no excuse is made for the delay; and the case stands fairly within our holding in Lambert v. Brown, supra, to be decided under a presumption that there was unreasonable neglect on the part of the plaintiff to bring this case on for final disposition. Lambert v. Brown was a stronger case in the plaintiff's behalf than this, inasmuch as there considerable effort was shown to at least keep the case alive, as a dismissal was, on plaintiff's motion, there once set aside during the five-year period. But here nothing appears to have been done for more than five and six years, respectively, in these actions. For similar holdings, see Notman v. Guffey Petroleum Co. 128 N. Y. Supp. 20; Mannion v. Steffens, 115 N. Y. Supp. 1087, affirmed on appeal in 135 App. Div. 921, 120 N. Y. Supp. 1134; Williams v. Jenkins, 76 Misc. 256, 134 N. Y. Supp. 890; Wilenski v. Philadelphia Casualty Co. 131 N. Y. Supp. 549; and Pociunas v. American Sugar Ref. Co. 74 Misc. 407, 132 N. Y. Supp. 395, reversing the same case in 130 N. Y. Supp. 162, and dismissing the action; Silverman v. Baruth, 42 App. Div. 21, 58 N. Y. Supp. 663. All of these cases are parallel to this in that they are reversals of orders denying motions to dismiss on identical grounds.

Neither the trial court, nor this court, has any alternative other than to apply the statute to this case, so plainly within its terms. As the motion should have been granted and the order of dismissal entered, plaintiff having been entitled thereto by right, it follows that the judgment thereafter entered should be set aside and vacated, and the action dismissed, and it is so ordered. The same order will be entered in each of these three entitled actions.

OLIVER LEVERSON v. OSCAR OLSON, Sheriff of Morton County, North Dakota.

(142 N. W. 917.)

Mortgage foreclosure sale — purchaser — prior mortgage — redemption — amount required.

Sections 7140, 7141, and 7465, Rev. Codes 1905, relating to redemptions from forced sales, construed and *held* not to require a person seeking to redeem from a purchaser at a mortgage foreclosure sale to pay such purchaser, in addition to his purchase price with interest, the amount of a mortgage lien held by him on the property which is prior to the mortgage that was foreclosed.

Opinion filed July 3, 1913.

Appeal from District Court, Morton County, *S. L. Nuchols*, J.

From a judgment denying a peremptory writ of mandamus, plaintiff appeals.

Affirmed.

B. W. Shaw and *Leverson & Olson* (*Newton, Dullan & Young*, of counsel), for appellant.

If a purchaser, at forced sale, is also a creditor having a prior lien to that of the redemptioner, other than the judgment (or lien) under which such purchase was made, the amount of such other lien, with interest, must also be paid by the redemptioner. There is no exception, and the statute must be strictly complied with. State ex rel. Brooks Bros. v. O'Connor, 6 N. D. 285, 69 N. W. 692.

A redemptioner must not only pay the amount of the purchase price and interest, taxes, etc., on redemption, but he must also pay the amount of any prior lien held by the purchaser against the property. VanDyke v. Herman, 3 Cal. 296; Knight v. Fair, 9 Cal. 117; McMillan v. Richards, 9 Cal. 413, 70 Am. Dec. 655.

Any prior lien which the purchaser may have, other than the one upon which sale was made, must be paid by the redemptioner or creditor holding a subsequent lien on redemption from sale. Sharp v. Miller, 47 Cal. 82.

If a redemptioner seeks to redeem from the purchaser, he must pay

all liens of the holder of the certificate of purchase, paramount to the lien under which redemption is sought to be made. 3 Freeman, Executions, § 1878; 17 Cyc. 1332; People ex rel. Rice v. Ransom, 2 Hill, 51.

Hanley & Sullivan (*John Carmody,* of counsel) for respondent.

A mortgagee cannot be compelled to accept payment of his mortgage until it is due. A judgment, when properly docketed, is always due, and payment may be made at any time. 11 Jones, Mortg. 6th ed. § 1052, and cases cited. North Dakota Horse & Cattle Co. v. Serumgard, 17 N. D. 466, 29 L.R.A.(N.S.) 508, 138 Am. St. Rep. 717, 118 N. W. 453; Rev. Codes 1905, § 6141.

A prior lien to that upon which sale was made, held by the purchaser or holder of the certificate of such sale, need not be paid by a redemptioner on redemption of the property from such sale. Nopson v. Horton, 20 Minn. 268, Gil. 239; Abraham v. Holloway, 41 Minn. 156, 42 N. W. 867; Campbell v. Oakes, 68 Cal. 222, 9 Pac. 77.

The lien of a prior judgment or mortgage is in no manner affected by sale under a subsequent lien. Campbell v. Oakes, supra; Horn v. Indianapolis Nat. Bank, 125 Ind. 381, 9 L.R.A. 676, 21 Am. St. Rep. 231, 25 N. E. 558; Bridgeport v. Blinn, 43 Conn. 274; McDonald v. Beatty, 10 N. D. 511, 88 N. W. 281. The cases cited in 17 Cyc. 1332, distinguished.

Fisk, J. This is an appeal from a judgment of the district court of Morton county, quashing an alternative writ of mandamus theretofore issued on the petition of plaintiff and appellant against the sheriff of said county. By such writ plaintiff sought to compel the defendant, as sheriff, to execute and deliver to him a sheriff's deed to the premises described in the writ, pursuant to a mortgage foreclosure sale and a sheriff's certificate issued to and held by plaintiff as the purchaser at such foreclosure sale. Prior to the expiration of the period allowed for redemption, one Wm. H. Brown, the owner of a junior mortgage on the premises, sought to redeem therefrom by paying to the sheriff the amount due the plaintiff as such purchaser, with legal interest, taking the requisite statutory steps to effect a redemption. It is conceded by appellant that such redemption was valid, provided it be held that Brown was not required, under the statute, to pay, in addition to the

amount paid by him, a sum sufficient to satisfy a mortgage held by plaintiff prior to the mortgage foreclosed. Whether it was necessary so to do is the sole question presented on this appeal. The trial court held adversely to plaintiff's contention.

The facts are not in dispute, and so far as material are as follows: On February 1, 1908, the real property involved was owned by one John Olson Solberg, and on that date he executed and delivered to Kate C. Montgomery a mortgage for $500 on said property due February 1, 1913, and also a commission mortgage thereon for $50 to William T. Souder to secure five promissory notes of $10 each, payable February 1, 1909–10–11–12 and 13 respectively, which commission mortgage is subject to the $500 mortgage aforesaid. On March 2, 1908, Solberg executed and delivered a third mortgage to the Bingenheimer Mercantile Company to secure the sum of $150, and on April 9, 1908, he executed and delivered to Wm. H. Brown a fourth mortgage for $400, under the lien of which latter mortgage Brown asserted his right to redeem. All of such mortgages were duly recorded, and no question arises as to the validity thereof, nor as to the priority of the liens on the premises involved, according to the dates of their execution, as above mentioned.

On February 26, 1910, the Bingenheimer Mercantile Company mortgage was duly and legally foreclosed, and the plaintiff and appellant became the purchaser at the sale, to whom a sheriff's certificate of sale was duly issued; the amount bid and for which the premises were sold was $228. On February 13, 1909, the Souder mortgage was assigned to appellant, and he was the owner and holder thereof at the time of Brown's redemption under the fourth mortgage; and it is appellant's contention that, in order to effect a valid redemption, Brown should have paid the amount due on the Souder mortgage.

While the statutory provisions governing this case are somewhat ambiguous, and do not clearly reflect the legislative intent, we are agreed that the construction adopted by the trial court is correct, and the judgment must therefore be affirmed. While the language of the statute, when literally construed, lends support to appellant's contention, we are constrained to hold, for reasons which we will hereafter briefly state, that such construction would do violence to the evident purpose and object of the legislature, which was that the debtor's

property, as far as possible, shall go toward the payment of his debts to the full extent of its value. McDonald v. Beatty, 10 N. D. 511, 88 N. W. 281; North Dakota Horse & Cattle Co. v. Serumgard, 17 N. D. 466, 29 L.R.A.(N.S.) 508, 138 Am. St. Rep. 717, 118 N. W. 453; Bridgeport v. Blinn, 43 Conn. 274. To such end, the redemption statute, which is remedial in its nature and purpose, should be given a liberal construction in order to effectuate the beneficent purpose and object of the legislature. The construction contended for by appellant would tend to frustrate rather than effectuate such legislative purpose.

The statutory provisions applicable to the case, and which we are called upon to construe, are the following:

Sections 7139 and 7140 relate to redemptions from execution sales and are as follows:

"Sec. 7139. Property sold subject to redemption, or any part sold separately, may be redeemed in the manner hereinafter provided, by the following persons, or their successors in interest:

"1. The judgment debtor or his successors in interest.

"2. A creditor having a lien by judgment, mortgage, or otherwise on the property sold or on some share or part thereof, subsequent to that on which the property was sold.

"The persons mentioned in the second subdivision of this section are in this chapter termed redemptioners."

"Sec. 7140. The judgment debtor or redemptioner may redeem the property from the purchaser within one year after the sale, on paying the purchaser the amount of his purchase, with 12 per cent interest thereon, together with the amount of any assessment or taxes which the purchaser may have paid thereon after the purchase, and interest at the same rate on such amount; and if the purchaser is also a creditor, having a prior lien to that of the redemptioner, other than the judgment under which such purchase was made, the amount of such lien with interest."

And § 6141 found in the chapter on liens in general in the Civil Code is as follows:

"Every person having an interest in property, subject to a lien, has a right to redeem it from the lien, at any time after the claim is due and before his right of redemption is foreclosed."

Section 7465 relates to redemptions from mortgage foreclosure sales, and reads as follows:

"The property sold may be redeemed within one year from the day of sale, in like manner and to the same effect as provided in chapter 12 of this Code for redemption of real property sold upon execution, so far as the same may be applicable, by:

"1. The mortgagor or his successor in interest in the whole or any part of the property.

"2. A creditor having a lien by judgment or mortgage on the property sold, or on some share or part thereof, subsequent to that on which the property was sold. Such creditor is termed a redemptioner, and has all the rights of a redemptioner under that chapter. And the mortgagor and his successor in interest has all the rights of the judgment debtor and his successor in interest as provided therein."

When we construe such statutes with a view of ascertaining the legislative intent, we are forced to the conclusion that the provision in § 7140, to the effect that if the purchaser is also a creditor having a prior lien to that of the redemptioner, the latter must pay the amount of such lien with interest; and that the provision in § 7141, requiring a redemptioner, in redeeming from another redemptioner, to pay the amount of any liens held by such last redemptioner prior to his own with interest, excluding the judgment on which the property was sold,— were intended to require the person redeeming to pay to the purchaser or prior redemptioner those liens only which are affected by the foreclosure sale. In other words, such provisions were meant to cover only such liens as constitute the holder thereof a redemptioner as defined in § 7139, and which liens would otherwise be cut off by the issuance of a sheriff's deed. Liens prior to the one under which the sale was made are, of course, in no manner affected by such sale, and the holders thereof need no such legislative protection. Why should the person redeeming be required to pay such prior liens if perchance it happens that the person from whom such redemption is made is the holder thereof, when he is not required to pay the same when held by someone else? A construction requiring such payment would enable the holder of a first mortgage which has a long time to run, to become the purchaser at the sale under a junior lien, and thus compel the debtor or redemptioner to pay such first mortgage in order to effect a legal redemption from

the sale under the junior mortgage. This might work a manifest hardship and injustice in many cases without any corresponding benefit to anyone. The legislative purpose, no doubt, was to obviate the necessity of requiring the person from whom the redemption is made, in order to protect his liens which are subsequent to the one under which the sale was made but prior to that of the redemptioner, to go through the useless ceremony of redeeming back from the person who had just redeemed from him. But, as before stated, no such purpose would apply to liens in no way affected by the sale, because of priority to the liens under which the sale was made. As to such liens the holder could not redeem if he desired to do so, as he is not a redemptioner under the Code.

It follows that the judgment appealed from is correct, and the same is accordingly affirmed.

FIRST NATIONAL BANK OF HILLSBORO v. A. STEENSON, as Treasurer of Traill County.

National banking association — taxes — personal — capital stock — shares — assessment.

1. Sections 24–26, 39 and 44, of chapter 132, Laws of 1890, considered and construed.

Held, under said statutes that a national banking association is neither authorized nor required to pay a personal tax on its shares of capital stock which has been assessed against the individual owners of such shares.

Taxes — collection — distraint — taxing officers — concurrent action — equity — action — real party in interest.

2. Where such taxes remain unpaid, and it is alleged that the county treasurer is about to distrain the goods and chattels of the individual owners of such shares, and sell the same in satisfaction of said taxes; and where it is further alleged that, by reason of the concurrent action of the taxing officers, said shares of stock were illegally and purposely overassessed and unequally assessed,—*held*, that an action in equity will not lie in behalf of the bank whose shares of stock have been so assessed to restrain the collection of said tax.

Note.—The authorities on the question of state taxation of shares of stock in national banks are collated in notes in 45 L.R.A. 743, 3 L.R.A.(N.S.) 584; and 7 L. ed. U. S. 939.

Under said statute the bank is not the real party in interest. Cummings v. Merchants' Nat. Bank, 113 U. S. 153, 25 L. ed. 903, distinguished.

Courts — equity — personal taxes — collection — restraint — assessments — remedies — individual taxpayer.

3. *Held* further, that resort cannot be had to a court of equity to restrain the collection of a personal tax alleged to be illegal in part by reason of an intentional overassessment and unequal assessment, in a case where the taxpayer has neglected to avail himself of the statutory remedies especially provided for such an abuse of authority on the part of the taxing officials.

Opinion filed November 28, 1898.

Defendant appeals from a judgment of the District Court for Traill County, *Charles A. Pollock,* Judge.

P. G. Swenson, for appellant.

Carmody & Leslie, for respondent.

WALLIN, J. This action was brought to restrain the defendant, as county treasurer of Traill county, from seizing and selling in satisfaction of certain taxes alleged to be illegal in part, the goods and chattels of certain persons named in the complaint, which persons it is alleged are severally the owners of divers shares of the capital stock of the plaintiff, and who collectively own, as it is alleged, all of the plaintiff's capital stock.

The taxes involved were assessed, equalized, and levied in the year 1895 by the taxing officials of the city of Hillsboro in Traill county, in which the plaintiff's bank is located, and by the officials of the county of Traill.

The action was commenced in December, 1896, and soon after its commencement a temporary restraining order was made by the district court, restraining the defendant from taking any steps whatever to collect any of the taxes in question; and after a trial of the action upon the merits the district court entered its judgment in favor of the plaintiff, and therein adjudged that said defendant be permanently restrained and enjoined from collecting—either from the plaintiff or from any of its said shareholders—any of the said taxes of 1895, except a certain part or percentage thereof which the district court de-

termined were valid and collectible taxes. From this judgment the defendant has appealed, and demands a trial anew in this court.

The substance of the plaintiff's cause of action, as set out in its complaint, when stated in general terms, is as follows: The plaintiff charges in substance that the several taxing officials of the city of Hillsboro and of the county of Traill, and particularly the city assessor of said city and the board of equalization of said county, did, in assessing and equalizing the taxes in said city and county for the year 1895, intentionally and illegally discriminate against said shareholders, and as against the property represented by said shares of capital stock; and to accomplish such discrimination it is charged that the valuation placed on said shares of stock by said assessor, and as equalized by said board of equalization, was relatively too high, and was much greater than the valuation placed upon other moneyed capital and personal property within said city and county.

The trial court sustains these allegations of the complaint in its findings of fact, wherein the court uses the following language: "The assessor of the city of Hillsboro, in making up the assessment roll for his city in the year 1895, did assess the holders of the several shares of stock composing the capital stock of said First National Bank, the plaintiff, at 81 per cent of its full cash value; and did assess other moneyed capital owned by individuals in said city of Hillsboro, subject to taxation, at only 35 per cent of its full cash value and did assess other personal property in the city of Hillsboro at 25 per cent of its actual cash value, and that said discrimination or rules of said assessment used by said assessor of the city of Hillsboro were wilful; and the assessor of the city of Hillsboro intended in each of said cases to assess said several classes of property at the percentage of their actual value as given above." The court finds that the city board of review did not change any of the said valuations as made by the city assessor, and further finds: "That the board of equalization of the said county of Traill, pretending to equalize the assessment rolls for the county of Traill, as they were authorized by law to do, did on the 12th day of July, 1895, by vote or resolution by them passed, place the assessed value of said shares of stock of the said plaintiff at 80 per cent of its full value, but did not raise the assessed valuation of other personal property in like proportion, or at all, so that the capital stock of said bank was assessed

to the holders thereof at the sum of 80 per cent of its full cash value, while other moneyed capital in said county was assessed at only 50 and 60 per cent of its full cash value within said city of Hillsboro; while other personal property within said city was left at an assessment of only 25 per cent and 33⅓ per cent of its full cash value." The court further finds that the action of the said county board of equalization in making said assessment of the capital stock of said plaintiff "was wilful, and for the purpose of procuring the taxation of the stock of banking corporations at a higher rate than other personal property and moneyed capital in said county of Traill, in violation of § 176 of the Constitution of North Dakota, and in violation of the national banking act." The court further finds that, before the commencement of this action, the plaintiff tendered the amount of said tax which was justly due, computed upon the same basis as taxes levied upon other moneyed capital and personal property in said city of Hillsboro, and that said offer was refused.

These findings of fact are challenged by exceptions thereto upon the ground that the same are unsupported by the evidence; but inasmuch as our disposition of the case will be controlled by other considerations, we have not found it necessary to consider the evidence or pass upon the exceptions to the findings of fact.

Passing to a consideration of the legal aspects of the questions presented by this record, and proceeding upon the assumption that all the facts stated in the complaint are true and sustained by the evidence, the question arises whether such facts constitute a cause of action in equity in favor of this plaintiff. It has been seen that the taxes in question were not assessed against the plaintiff, nor is it alleged that plaintiff was ever requested to pay the same or any part of the same, and much less is it alleged or claimed that the defendant, as county treasurer, or otherwise, has ever threatened to seize or sell any of the property of the bank as a means of satisfying any of said taxes; but, on the contrary, it is expressly alleged "that the treasurer of said county, defendant herein, threatens and is about to distrain the property of the shareholders of plaintiff's capital stock." Nor does it appear that the shareholders of plaintiff's capital stock, who are personally liable to pay the tax, have ever requested the plaintiff to interfere in their behalf, or that they now desire this action to be prosecuted.

Upon this state of facts we confess our inability to understand the legal theory upon which this plaintiff can ask for or receive the aid of a court of equity. The taxes in question were assessed and levied in the year 1895, and are therefore governed by §§ 24, 25, and 26 of chapter 132 of the Laws of 1890. Under § 24 the shares were properly assessed to their owners respectively as individuals. Nor does § 26, supra, make the plaintiff or its property liable to pay such assessment in any contingency whatever. Nor does it in any way appear to this court that there is any liability, direct or contingent, upon the part of the plaintiff to pay said taxes or any part of the same. Wherein, therefore, is the plaintiff injured by the threatened seizure of the personal goods of others? Adverting to the statute under which the county treasurer can distrain personal property as a tax collector, we discover that that officer is empowered to seize and distrain in satisfaction of a personal property tax "goods and chattels belonging to the person charged with such taxes." See § 55, chapter 132, Laws of 1890, amended § 5, chapter 100, Laws 1891. The treasurer, under this authority, would be powerless to seize property belonging to the plaintiff, and, as has been said, no such seizure is alleged to have been threatened or contemplated.

If in any case the writ of injunction may be invoked to restrain the collection of a personal tax by the seizure of goods and chattels, it is needless to say that it cannot be invoked by a party whose property is not in any danger of seizure; nor by a party against whom no tax has been assessed and from whom no payment of taxes has been or can be lawfully demanded by the tax collector. Counsel for respondent cites the case of Cummings v. Merchants Nat. Bank, 101 U. S. 153, 25 L. ed. 903, as sustaining his contention that an injunction will be granted at the suit of a national bank to restrain the collection of an illegal tax levied against its stockholders on their shares of its capital stock. That case originated in the circuit court of the United States, and its decision involved a construction of the revenue laws of the state of Ohio. In the case cited the Supreme Court sustained the remedy by injunction on two grounds: First, upon the ground that under the Ohio statute the bank itself was expressly authorized to pay the tax upon its shares, and was allowed to indemnify itself for such payments

in the different ways pointed out in the Ohio statute; secondly, the remedy was sustained upon the ground that the statutes of Ohio (in addition to certain legal remedies) allowed the taxpayer in terms to resort to the remedy by injunction in such cases. The court in its opinion further noticed the fact that the remedy of paying the illegal tax, and suing at law to recover it back, would be inadequate in view of the peculiar fiduciary duties imposed upon the bank by the statutes of that state.

None of these grounds or reasons for the interference of a court of equity exist in this state. As we have seen the statute of 1890, chapter 132, §§ 24–26, unlike § 1184, Rev. Codes 1895, neither authorizes nor requires the bank to pay the taxes assessed against its shareholders; nor is there any statute authorizing the use of an injunction in this class of cases in this state.

Another consideration, in our opinion, is equally decisive of this case. It is not claimed that the plaintiff, or any of its said shareholders, ever presented their grievances arising upon the alleged unequal and overvaluation of said shares of capital stock, to either the board of review of the city of Hillsboro, or the board of equalization of Traill county, or to the state auditor, all of which officers are expressly empowered by the revenue laws of this state to hear and redress grievances of the character set out in this complaint. See Sess. Laws 1890, chap. 132, §§ 39 and 44; also Sess. Laws 1891, chap. 100, § 11.

While there is some conflict of authority upon the question it is nevertheless settled by the great preponderance of cases that the writ of injunction will be denied to restrain the sale of personal property in satisfaction of an illegal personal tax in a case where the taxpayer has neglected to avail himself of the statutory method of correcting the abuse of an unequal or overvaluation. O'Neal v. Virginia & M. Bridge Co. 18 Md. 1, 79 Am. Dec. 669; Johnson County v. Searight Cattle Co. 3 Wyo. 777, 31 Pac. 268; Smith v. Marshalltown, 86 Iowa, 516, 53 N. W. 286; New York & C. Grain & Stock Exch. v. Gleason, 121 Ill. 502, 13 N. E. 204; Meyer v. Rosenblatt, 78 Mo. 495; Breeze v. Haley, 10 Colo. 5, 13 Pac. 913. In the case of Humphreys v. Nelson, 115 Ill. 45, 4 N. E. 637, the court fully sustains this rule, and in its opinion, page 51, says: "Having abundant remedy at law for the correction of the errors by which it claims to have sustained injury, and

having neglected to resort to that remedy, it cannot now have relief in a court of equity," citing Adsit v. Lieb, 76 Ill. 198; also People v. Big Muddy Iron Co. 89 Ill. 116. See 25 Am. & Eng. Enc. Law, page 452, and cases cited in note 3.

Upon the authorities cited it will follow that a court of equity will not enjoin the collection of the taxes in question, and the judgment entered in the District Court restraining their collection is therefore erroneous, and must be reversed, and a judgment entered below dismissing this action. It will be so ordered.

All the judges concurring.

(This case should have been reported in one of the earlier volumes, but was, through the inadvertence of the printer, mislaid and omitted.)

IN THE MATTER OF THE APPEAL OF THE FIRST NATIONAL BANK OF HILLSBORO FROM THE COUNTY BOARD OF COMMISSIONERS OF TRAILL COUNTY, NORTH DAKOTA.

Appeal — board county commissioners — board equalization — assessments — judicial.

Under § 1927, Revised Codes 1895, an appeal will lie from a decision of the board of county commissioners made while equalizing and correcting assessments in a controversy then pending before them and judicial in its character.

Real estate — national banks — capital stock — assessments — individual shareholders — equalization — taxation — excessive — double.

Certain real estate belonging to a national bank, and in which a portion of its capital stock was invested, was assessed to the bank as other real estate in the district was assessed. At the same time the shares of stock in said bank were assessed to the individual shareholders, and, in equalizing the assessment of said shares and in fixing their value, the board of county commissioners refused to deduct from the capital of the bank the amount invested in real estate. *Held*, that such action constituted neither excessive nor double taxation.

Opinion filed December 5, 1898.

Note.—For the authorities on the question of state taxation of shares of stock in national banks, see notes in 45 L.R.A. 743; 3 L.R.A.(N.S.) 584; and 7 L. ed. U. S. 939.

Appeal from the District Court for Traill County, *Charles A. Pollock,* Judge.

P. G. Swenson, for appellant.

Carmody & Leslie, for respondent.

BARTHOLOMEW, Ch. J. In 1896 a controversy arose in Traill county between the board of county commissioners, sitting to equalize and correct assessments, and the banks doing business in the county, relative to the proper equalization of the taxes upon bank stock. As a result of this controversy the said board on the 11th day of July, 1896, passed a resolution and entered the same upon its records, which reads: "On motion all shares of bank stock was equalized to average sixty (60) per cent on capital stock." From the decision so entered the First National Bank of Hillsboro, plaintiff herein, appealed to the district court of said county. In the district court the plaintiff was successful, and the defendant brings the case here on appeal.

When the case was reached for trial in the district court the defendant appeared specially, and moved to dismiss on the ground that the court had no jurisdiction, for the reason that it appeared by the notices of appeal that it was an attempt to appeal from the board of equalization, and that the statute allowed no appeal from such board. The denial of this motion is the first point for our consideration. We think the point cannot fairly be considered open in this jurisdiction since the decision in Pierre Waterworks Co. v. Hughes County, 5 Dak. 145, 37 N. W. 733. It was squarely raised in that case, discussed with great ability by Chief Justice Tripp, and the unanimous court held that the appeal would lie. That decision has never been reversed, modified, or questioned. Then as now appeals were allowed from all decisions of the board of county commissioners from matters properly before them. Political Code of 1877, § 46, chapter 21; Revised Codes 1895, § 1927. But much learning was expended in the waterworks case in determining that the board of equalization was in fact the board of county commissioners. The statute then in force (§ 28, chap. 28, Political Code of 1877) declared: "The board of county commissioners of each county shall constitute a board of equalization for the county, and said board or a majority of the members thereof shall hold a session of not less than two days," etc. It was contended that there were

two separate boards composed of the same persons, and that authority to appeal from decisions of the board of county commissioners did not include authority to appeal from decisions of the board of equalization. The opinion fairly met and refuted the contention; but our legislature as if to remove all doubt upon the subject has enacted that "it shall be the duty of the board of county commissioners of each county, at its regular meeting in July of each year, to devote the first two days, or more if necessary, of such meeting to the proper equalizing and correcting of the assessment roll in its county." Revised Codes 1895, § 1213. That section was in full force when the tax in question was assessed and when the decision appealed from was entered. No such thing as a county board of equalization is recognized. The board of county commissioners equalize the taxes, and this they do in the same capacity in which they perform any other functions imposed upon them by law. It follows that the only ground upon which the motion to dismiss was based had no foundation in the law as it then stood.

But, notwithstanding the broad language of our statute which declares that appeals may be taken from "all decisions" of the board upon matters properly before it, we must not be understood to give judicial sanction to the proposition as stated. It must have its limitations. It would not be proper for us to enter into an extended discussion as to what matters may not be appealed. We need only say that the powers of a board of county commissioners are very comprehensive and extend to all ordinary matters in which the county, as such, is interested. They are in fact executive, administrative, political, and judicial or quasi judicial. Courts have no such extended powers. They are limited to the consideration of matters purely judicial in character. See §§ 85 and 96, State Constitution. But if a party be wrongfully and unjustly taxed in violation of law (and that is what plaintiff claims in this case), then a wrong exists for which there must be a remedy in law in some form. The courts can take cognizance of it, independent of any action of the county commissioners, because it is inherently judicial in character; and being a proper subject for judicial determination, the manner in which it may be brought before the court is entirely within legislative control. It is our duty to give force to the statute so far as it comes within the Constitution; and

the facts that its enforcement may result in practical inconvenience or in delay in collecting the revenue furnish us no warrant for declaring the statute void, or limiting its operation. We have no such power. Those matters pertain to the legislature exclusively. One further remark to avoid misapprehension. The word "decision" in the statute is not synonymous with "determination." The board may determine upon certain proceedings in any matter properly before it, and in a general way, and about which there is no special controversy. Such a determination would not, we think, be appealable whatever might be the nature of the matter concerning which the determination was made. A decision presupposes a controversy, and to be appealable a decision must be upon a point concerning which some specific claim was made by the party taking the appeal, and which claim was denied, in the whole or in part, by the decision of the board. In this case it sufficiently appears that there was a controversy between the banks in Traill county and each of them, on the one hand, and the county commissioners, on the other, concerning the taxation of bank stock, the banks claiming that they were being unjustly and unlawfully taxed. This claim the board, by its decision, denied. The question was a judicial question. We hold that an appeal lies in this case, and this brings us to a consideration of the merits.

We are concerned only in ascertaining whether or not the holders of the stock of the plaintiff bank have been unlawfully taxed. Under § 1184, Revised Codes 1895, the bank stock is assessed against the shareholders, but the bank as agent for such shareholders is required to pay the tax. Hence the bank is the proper party plaintiff in this case. It is conceded that the capital stock of the plaintiff bank is $50,000, divided into shares of $100 each. Its surplus fund at the date of taxation was $10,000. The resolution from which the appeal was taken fixed the valuation of shares of bank stock at 60 per cent on capital stock, or for the plaintiff bank at $60 per share. The book value of the stock, as shown by capital and surplus, was $120 per share. Its actual market value is not disclosed. What evidence there is on the point tends to show that it was a larger figure. It was not therefore to the disadvantage of the stockholders to value the entire stock at the amount of the capital stock. The evidence shows without contradiction that other moneyed capital in that taxing district was

assessed at 60 per cent of its face value. Thus far plaintiff has no just ground of complaint; nor do we understand that it would complain if that were all. But it is conceded that at that time the bank had invested in real estate over $43,000, and that this real estate was taxed to the bank as other real estate in the district; *i. e.*, from 25 to 33 per cent of its value. Under these facts plaintiff claims that its stock is being taxed in violation of the constitutional provision requiring uniformity of taxation (see § 176, State Constitution), and also of that portion of the national banking act (§ 5219, U. S. Rev. Stat., U. S. Comp. Stat. 1901, p. 3502), which, while it permits the states to tax the stock of national banks in the hands of the shareholders, yet declares that such shares shall not be taxed higher than other moneyed capital. It is urged that the real estate owned by the bank represents so much of the capital of the bank, and, since it is taxed in its character of real estate, the amount invested therein must be deducted from the total capital of the bank, and the remainder only must be used in ascertaining the value of the stock for the purposes of taxation. To hold otherwise, it is claimed, necessarily results in taxing so much of the capital as is so invested twice,—once as real property, and once as bank stock. This argument is specious. It may be true that if the state should elect to exempt the real estate owned by a banking corporation when it required the shares of stock to be assessed at their full value, or if it should elect to deduct from the total capital the amount invested in real estate, and use the remainder as a basis for determining the value of the stock, that other taxpayers would have no legal ground of complaint on the score that either the bank or the shareholders were unduly favored. Our revenue law of 1890 expressly provided that in fixing the value of shares of bank stock the assessors should deduct from the total capital of the bank the amount legally invested in real property, and the remainder should represent the taxable value of the shares,—the real estate being taxed under the general law. There was nothing inequitable in that provision. There is nothing inequitable in a provision that permits any taxpayer to deduct from the total amount of his assets the amount of his indebtedness, and use the remainder as representing the value of his estate; and yet no taxpayer, in the absence of such a provision, has the legal right to demand such a reduction, and it does not aid him any to show that

the evidences of his indebtedness are taxed by the same authority that taxes his estate, even when it is certain that the estate must be depleted to pay the debts. Neither the debtor nor the creditor can be heard to say that it is double taxation. Yet it is perfectly apparent that if one taxpayer be indebted in an amount equal to his entire estate, and if the evidences of that indebtedness be held by his neighbor in the same taxing district, and if both the estate and the evidences of indebtedness be taxed at their full value,—and that is the theory of our law,—the aggregate amount on the assessor's books will be double the actual, tangible wealth; and yet there is no double taxation. Why? The answer is ready in the mouth of anyone who has ever studied the rudiments of the law of taxation. Because the estate is property of one kind in the hands of one party; the evidences of indebtedness, while their value depends upon and is measured by the estate, yet they are property of another kind in the hands of another party.

This argument of double taxation has frequently been made under these same circumstances in behalf of banks and the holders of shares of bank stock. It has not been allowed by the better-considered or modern cases. Its basis is untenable. It proceeds upon the theory that the bank and its shareholders are one. Counsel in this case have argued at great length, and presented an array of figures to demonstrate that the bank pays upon its shares upon a valuation largely in excess of their par value. This is all wrong. The bank does not pay a penny of taxes upon the shares except as agent for the stockholders, and for all money so paid it reimburses itself from the dividends or other property belonging to such shareholders. The shareholders pay no tax upon the real estate. That is the property of the bank. The shareholders and the bank are as distinct for purposes of taxation as separate individuals. In law the bank is an entity,—a person,—with its individual assets and its individual liabilities. Among these individual liabilities is its obligation to pay to its stockholders the face value of the shares of stock held by them. True this obligation may not mature until the bank ceases to do business; but it is no less a sacred obligation. If, then, the property of the bank be sufficient as between the creditors of the bank, the law, for reasons of public policy, makes the shareholder a deferred creditor, but he is none the less a creditor. His certificates of stock constitute the evidences of the bank's

indebtedness to him. He cannot object that such evidence of indebtedness is taxed because the law says it shall be taxed. He cannot object that the real estate of his debtor, the bank, is taxed because the law says it shall be taxed. Taxation is the rule, exemption from taxation is the exception. He who claims exemption must be able to put his finger upon the law creating the exemption. True it is that the contract of the shareholder with the bank is such that he is entitled to share in the net profits made by the bank. It is this feature that brings his stock above par; and the value of his stock is dependent, in a measure, upon the earning capacity of the bank, or, in other words, upon the amount of net profits to be divided. Of course every item of necessary expenses paid by the bank reduces this amount, but the stockholder has no more legal right to say that the bank shall not pay its indebtedness to the state than it has to say that it shall not pay its hired clerk.

In the case of Van Allen v. Assessors (Churchill v. Utica) 3 Wall. 573, 18 L. ed. 229, it is said: "The corporation is the legal owner of all the property of the bank, real and personal; and within the powers conferred upon it by the charter, and for the purposes for which it was created, can deal with the corporate property as absolutely as a private individual can deal with his own." And again: "The interest of the shareholder entitles him to participate in the net profits earned by the bank in the employment of its capital, during the existence of its charter, in proportion to the number of his shares; and, upon its dissolution or termination, to his proportion of the property that may remain of the corporation after the payment of its debts. This is a distinct, independent interest or property, held by the shareholder like any other property that may belong to him. Now, it is this interest which the act of Congress has left subject to taxation by the states, under the limitations prescribed." In that case it was held that while the capital stock of the bank was invested in United States bonds that were exempt from taxation, nevertheless the shares of stock in the hands of shareholders were subject to taxation. To same effect is New York v. Tax & A. Comrs. 4 Wall. 244, 18 L. ed. 344; Palmer v. McMahon, 133 U. S. 660, 33 L. ed. 772, 10 Sup. Ct. Rep. 324. In Farrington v. Tennessee, 95 U. S. 687, 24 L. ed. 560, it is said: "The capital stock and the shares may both be taxed, and it is not

double taxation;" and many authorities are cited to support the proposition. Further, Mr. Justice Swayne enumerates in that case as taxable property in addition to the capital stock: (1) The franchise to be a corporation, etc., citing Hamilton Mfg. Co. v. Massachusetts, 6 Wall. 632, 18 L. ed. 904; Wilmington & W. R. Co. v. Reid, 13 Wall. 264, 20 L. ed. 568; (2) accumulated earnings, State ex rel. Mutual Ben. L. Ins. Co., Prosecutors, v. Utter, 34 N. J. L. 493; St. Louis Mut. L. Ins. Co. v. Charles, 47 Mo. 462; (3) profits and dividends, Atty. Gen. v. Bank of Charlotte, 57 N. C. (4 Jones, Eq.) 287; (4) real estate belonging to the corporation and necessary for its business, Wilmington & W. R. Co. v. Reid, 13 Wall. 264, 20 L. ed. 568; Bank of Cape Fear v. Edwards, 27 N. C. (5 Ired. L.) 516. In Tennessee v. Whitworth, 117 U. S. 129, 29 L. ed. 830, 6 Sup. Ct. Rep. 645, Mr. Chief Justice Waite, after referring to the national bank cases already cited, says: "In corporations four elements of taxable value are sometimes found: (1) Franchise; (2) capital stock in the hands of the corporation; (3) corporate property; and (4) shares of the capital stock in the hands of the individual stockholders." Again, in Bank of Commerce v. Tennessee, 161 U. S. 134, 40 L. ed. 645, 16 Sup. Ct. Rep. 456, Mr. Justice Peckham says: "The capital stock of a corporation and the shares into which such stock may be divided and held by individual shareholders are two distinct pieces of property. The capital stock and the shares of stock in the hands of the shareholders may both be taxed, and it is not double taxation." The Second Ward Sav. Bank v. Milwaukee, 94 Wis. 587, 69 N. W. 359, is identical in principle with the case at bar. The plaintiff in that case was a state bank, but it does not affect the principle. In that case the court said: "It is contended that to tax the bank upon the value of this real estate is, under the circumstances, double taxation,—first, in taxing the shares of its stockholders; and, second, in taxing the real estate of the bank, the legal owner of it. Now, the tax on the shares of stock which are owned by the stockholders is not a tax on the capital or capital stock of the bank, nor is it a tax on the real estate of the bank." And, after fully citing the authorities, the court concludes: "The objection that the taxation complained of is double taxation, and therefore illegal, cannot be sustained. Double taxation is defined as the 'requirement that one person or known subject of taxation shall directly contribute

twice to the same burden, while other subjects of taxation, belonging to the same class, are required to contribute but once,' Cooley, Taxn. 2d ed. 225. Here there is diversity of person, as well as of subject of taxation. The shares of stock are the legal property of the stockholders, and, although the value of the stock is founded upon and dependent upon the value of the property of the corporation, they are, nevertheless, a species of property altogether separate and distinct in character and ownership from the capital or property of the bank. The shareholders, as such, are not the owners of the capital or property of the bank, the title to which is vested in the bank itself. It cannot therefore be said that the case presented is one of double taxation either as to person or subject." These authorities we regard as overwhelming, and their reasoning is very satisfactory. It follows that neither the plaintiff bank nor its shareholders were doubly or unjustly taxed.

The District Court is ordered to set aside its judgment and decree herein, and reinstate the resolution appealed from.

Reversed.

YOUNG, J., concurs.

WALLIN, J., dissenting. I am unable to agree with my associates in the disposition made of this case. I differ from them, however, only upon the question of the right to appeal from the action of the county board when sitting as a board of equalization. True, such action may be somewhat in the nature of a "decision," and it is further true that the statute defining the powers and duties of the county board declares that, "from all decisions of the board upon matters properly before it, an appeal may be taken to the district court by the person aggrieved." Revised Codes 1895, § 1927. But it is conceded by the courts whose decisions are cited and referred to with approval in the majority opinion, that this statutory provision cannot be construed literally without inviting the most serious consequences to public business. In the very cases cited and those referred to in the cases cited, it is held that many "decisions" of the county board cannot be reviewed by an appeal under this statute, and that among the decisions of the board expressly enumerated as nonappealable are those which are political and those which are administrative in their nature. It will at once be observed

that this rule of construction will exclude from the operation of the statute a very large majority of the decisions which a county board in the exercise of its functions is called upon to make. The duties of the board are statutory, and such duties, with a few exceptions, are enumerated in articles 7 and 8 of the Political Code. See Revised Codes 1895, §§ 1892–1951. A glance at these sections discloses the character and kind of "decisions" which the board is called upon to make. Among them are the following, *viz.*: The division of counties into commissioner districts, also changing the boundaries of districts; to punish contempts; to cancel and destroy county warrants; to institute actions; to sell and purchase real estate for county purposes upon a majority vote therefor; to levy taxes; to construct and repair bridges; establish election precincts; equalize assessments; provide a fire-proof safe for the use of county officers; to submit to the people the question of an extraordinary expenditure of money; to provide a court room and jail; to erect county buildings and make building contracts; to settle accounts of county officers; to designate banks as county depositories, etc., etc.; also to approve the official bond of county officers. Id. § 342. Under the rule laid down in the cases cited in the majority opinion, it seems to be clear that any decision which the county board may lawfully make with respect to their duties above enumerated would be non-appealable decisions, such enumerated duties appearing to be neither administrative nor political in their nature, and clearly none of the same are strictly judicial. I am not at loggerheads with this restricted view of the appeal law. On the contrary it is my opinion that the statute should be, by construction, so narrowed in its scope in order to prevent partial suspension, if not a total paralysis, of the duties devolved by law upon boards of county commissioners. If all final decisions necessarily made with respect to the multitude of matters within the jurisdiction of county boards are removable by appeal to the district court by means of a simple notice and an undertaking for costs, and thereafter may in due course be transmitted to this court for final determination, the necessary result would be that duties which are expressly devolved by law upon executive and administrative officers would in appeal cases be cast upon others, *viz.*, judicial officers whose duties are wholly different in nature, and who are usually far less capable of performing such duties than the officers elected by the people

to perform the same. But manifestly the worst effect of such a construction of the appeal law in question would be the delays incident to such appeals if allowed.

Fortunately the courts have, to some extent, foreseen the serious consequences which would inevitably follow from the practice of allowing appeals to be taken from all "decisions" in matters properly before the board of county commissioners. It must be conceded, however, that a literal interpretation of the statute would permit all such decisions to be reviewed in the district court upon the easy terms specified in the statute; but courts under established rules of construction may depart from the literal meaning of terms employed in a statute when this course will give effect to the legislative intent. This rule has been fully recognized in the case cited in the majority opinion, and there referred to.

But I maintain that for obvious reasons, the salutary rule of construction should be applied in the case at bar, and insist that the same is broadly ignored by the majority of the court in deciding this case. In my opinion there are peculiar and cogent reasons which are opposed to allowing the assessment and collection of the public revenues to be obstructed by the vexatious delays that would certainly follow if it be once settled by this court that appeals would lie to the courts with respect to decisions in matters of taxation made by the county board. True, such delays have not occurred in the past, but I explain this fact by the prevailing understanding of the profession that no such appeal will lie. Since this court has been organized, not a single tax case has come before us under this statute. It is quite probable, too, that this appeal would not have been attempted had the law not been somewhat changed by the revisioners of the Codes. Under the original statute the board of county commissioners did not, in strictness, act as a board of equalization; but under the Revised Codes it does so act. See Revised Codes 1895, § 1213.

But I am unable to see how this change, which is nominal rather than real, can at all militate against the strength of the reasons which stand opposed to allowing an appeal from the decisions or conclusions which a board of equalization, however constituted, may make.

There are considerations too numerous to mention which, in my judgment, should constrain the courts of this state to hold that the

action of boards of equalization ought to be added to the already long list of "decisions" which under the cases cited are nonappealable under this statute. I maintain that the appeal is not only inadequate as a remedy, but that it is wholly unnecessary to the protection of taxpayers against the consequences of illegal taxation. Other remedies of the taxpayer are ample. If an illegal tax culminates in a lien upon or a sale of real estate, a court of equity will cancel the lien or vacate the sale and the muniments of title resulting from the sale; and, on the other hand, if a tax upon personal property is unlawful, the taxpayer, when compelled by distraint of his property to pay the same, an action at law can be maintained to recover back such taxes, with costs. This remedy was open to this plaintiff. Besides these familiar remedies, others are added by statute whereby the taxpayer is fully protected by the courts against unlawful taxation, without resort to the dubious right in question.

I claim, further, that such appeals are inadequate as a means of arresting the illegal action of either the board of equalization, or the other county officers who have duties to perform in connection with the levying the taxes, extending the same upon the tax lists or collecting the tax so extended. After property values are equalized by the county and state boards, the next step under the statute is to extend the tax upon the list as against the values so equalized, and this is followed by delivering the list to the county treasurer for collection. Once in the hands of the county treasurer the taxes on the list are required to be collected by that officer, and there is no power short of a decree of a court which will excuse the treasurer for the noncollection of such taxes. The collection of taxes is not among the duties of county boards, nor can such board lawfully prevent such collection by its unaided action. And just here attention is called to the fact that an appeal from the action of the board of equalization is a useless expenditure of energy, and wholly abortive as a means of preventing any step required by law to be taken by the taxing officers, after the board has completed its work and has equalized the taxes and adjourned *sine die*. If an illegal tax is laid by means of the unauthorized action of the board, such illegal tax must nevertheless, under the statute, so far as the tax is affected by the alleged right of appeal, be extended upon the tax list by the auditor and be thereafter collected by the treasurer. The appeal

does not stay the proceedings either of the board or of other officers who have duties to perform in laying the taxes for the public revenues. No provision is made in the statute either for a stay or a stay bond; but, on the contrary, the statute requires only a simple bond for costs in the district court. Revised Codes 1895, § 1927. It is therefore entirely clear that the alleged right of appeal is inadequate as a means of preventing the placing of an illegal tax upon the tax list, or as a means of preventing the treasurer, who is not a party to such appeal, from collecting the illegal tax. The impotency of such appeal as a remedy is made manifest in this case.

The obnoxious resolution of the board of equalization was adopted in the month of July, 1896, and the appeal therefrom was perfected within thirty days thereafter. Since then the appeal has been pending in the district court and in this court until the present time,—December, 1898. Meanwhile, what have the taxing officers of Traill county been doing in the way of discharging their imperative duties under the law with respect to collecting the public revenue? This question is readily answered from the record, which shows that the alleged illegal tax has in due course found its way to the tax list, which at last advices was in the hands of the county treasurer for collection, where it was placed in due course under the law in the year 1896. If the treasurer has *ex gratia* foreborne to collect this tax, it has been solely an act of forbearance on his part, and cannot be attributed to any restraint placed upon his action by virtue of this appeal. Not only does the appeal not operate as a stay of official action in general, but the treasurer, not being a party to it, cannot be affected by such appeal. Nor did the appeal operate practically or at all to restrain the county auditor from extending the tax against the plaintiff's property in accordance with the value fixed in the obnoxious resolution of the board.

Again, it must not be overlooked in this connection, as further illustrating the abortive character of this alleged remedy by appeal, that the good or bad effect of the resolution of the board remains intact despite the appeal. The trial court, assuming the powers of a court of equity, decreed that the resolution should be "reversed," but did not attempt the impossible by further decreeing that the board should in 1897 reassemble and pass another and different resolution, fixing the value of plaintiff's property as a basis for a tax to be levied for

the year 1896. The court below went no further than to "reverse" the resolution appealed from, and thereby declared in effect that all taxes based upon the same were illegal; but this conclusion, as has been seen, produced no effect upon events already concluded. It did not arrest any official action based upon the resolution. True the trial court further decreed that the part of the tax found by that court to be legal should be paid "immediately," and that the county treasurer should be enjoined from collecting the part found to be illegal by the trial court. But this result we have seen could have been reached by other proceedings, in which the action of the board would not be involved. Besides it is apparent that the judgment in the appeal case is not binding upon the treasurer, for the simple reason that he had not been heard in the case, not being a party thereto.

The appeal law, § 1931, provides in terms that "the district court may enter a final judgment," but this cannot be construed as conferring authority to enter a judgment without a hearing and against strangers to the record. But the same section also confers upon the district court authority to send the same back to the board, with an order how to proceed, and "require such board to comply therewith by mandamus or by attachment for contempt." If this section can be applied to the case at bar at all, the only proper course to pursue (after the district court had entered its judgment reversing the obnoxious order) was to send the case back to the board, and direct it to annul or reverse the order appealed from. There would, it is true, be insurmountable obstacles to this course of procedure. Not only had the board of equalization adjourned *sine die* for the year 1896, without power to reassemble as such board, but, as we have seen, other taxing officers not parties to the record had in the interval taken action based upon the resolution in question, and taxes based thereon had been levied, extended, and delivered to the treasurer for collection long before the district court entered its judgment. I allude to these considerations, however, only for the purpose of further illustrating the thought that the legislature could not have contemplated an appeal from the action of a board of equalization when it enacted the statute embraced in § 1941, Revised Codes 1895.

But there is another consideration which is very persuasive to my mind at least, against this alleged right of appeal. It is this: Boards

of equalization are chosen by the people to correct errors and irregularities which may arise in valuing property for purposes of taxation, and the law expressly devolves these duties upon such board and boards of review. The members of the board are drawn from all parts of the county, and hence are familiar with property values in all parts of the county, and are therefore in a position to discharge their duties intelligently and with a wise reference to the interests of both the public and the taxpayer. These tribunals are required to assemble annually at a fixed time and place, and there adjust values in accordance with law and the principle of equity and justice. To this tribunal the taxpayer, whether citizen or not, has a legal right to resort, and there he may state his grievances and find his remedy without expense and without let or hindrance from any source, and if he is denied a hearing, that fact alone will invalidate any tax that may be imposed without a hearing. Inasmuch as an ad valorem tax can only be laid upon a value ascertained by some board or officer, it follows that such board or officer should have the final right to determine values. But grant a right of appeal, and what follows? Simply this: A court will supersede the duly constituted authority, and substitute his own estimates of values, absolute and relative, for that of the board chosen by the people for that purpose. I do not hesitate to say that in my judgment the courts are far less able and fitted for this work than are the county boards. Courts can only act upon evidence, while boards are not limited to evidence, but can and should act both upon evidence and their own knowledge of facts and values. This court said in Wells County v. McHenry, 7 N. D. 246, 74 N. W. 241: "We doubt the expediency of any legislation which should vest all the powers of boards of equalization in the ordinary judicial tribunals. Local boards are better qualified to exercise such functions. And the imposition of such burden upon the courts would seriously impair their efficiency in the discharge of those duties which are germane to the judicial branch of the government." Final authority to fix values for taxation must rest somewhere, and I am confident that it is intended to be left with the assessors and the various boards of review and equalization. Their conclusions are not supposed to be absolutely accurate or absolutely just in all cases. Yet experience has shown that the results reached by these officials are generally sound and just. If these officers do, however, act

illegally, corruptly, or without jurisdiction, there is a remedy to be found in the courts for such abuse, and this without resorting to the alleged right of appeal.

I will add but a single consideration to these already advanced. If the decisions of the county board, while sitting as a board of equalization, are reviewable under this statute, I can see no escape from the conclusion that a decision of the county board, in levying the annual taxes for all purposes, is likewise appealable under the same statute. But if such an appeal would not arrest the collection of the taxes as levied, and I think it would not have that effect, the same would be an idle and worse than useless proceeding; but if it did stay the collection of the tax, such a result would be nothing less than a public calamity.

These considerations and many others which could be added, have convinced me that the legislature did not intend to include tax proceedings in providing for appeals from the "decisions" of county boards. Such appeals, if ever allowed, can only be justified under a statute which clearly confers the right, and our statute, in my judgment, does not do so.

(This case should have been reported in one of the earlier volumes, but was, through the inadvertence of the printer, mislaid and omitted.)

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1. An order denying a motion for judgment *non obstante veredicto* is nonappealable. Houston v. Minneapolis, St. P. & S. Ste. M. R. Co. 469.
2. An order denying a motion for judgment notwithstanding the verdict does not come within subdivision 1 of § 7225, Rev. Codes 1905, making appealable an order affecting a substantial right in any action, when such order in effect determines the action and prevents a judgment from which an appeal might be taken; to be reviewed upon appeal, such an order must be included in or connected with a denial of a motion for a new trial. Turner v. Crumpton, 134.
3. Appeal may be taken from a part of a judgment in a suit tried under § 7229, Rev. Codes 1905, commonly known as the Newman act, by a party who contents himself with the findings of fact made by the trial court and takes the appeal to review whether such part of the judgment is supported in law under such facts, since the section is not in itself a complete enactment upon appeals but deals mainly with the retrial of questions of fact by the supreme court, and, where the findings of fact in such a suit by the trial court are left unassailed, the matter of appealing is governed by the general appeal law covered by chapter 15 of the 1905 Rev. Codes, so that § 7205, which allows appeal from a part as well as from the whole, of a judgment, governs. Christ v. Johnstone, 6.

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4. An objection properly interposed to a general question covers all subsequent questions on the same subject propounded to the same witness, and having for their object the eliciting of answers necessarily included in the answer to the main question. Hintz v. Wagner, 110.
5. Where the examination of an injured person made by a medical expert is shown by his testimony leading up to the question as to his diagnosis to be, on account of its method and circumstances, an incompetent basis for the ultimate question, the adverse party need not have objected to the foundation testimony in order to take advantage of such incompetency, but all that is necessary is for him to make proper objection to the ultimate question. Hintz v. Wagner, 110.

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6. An order for judgment is reviewable on appeal from the judgment, and a notice of appeal which reads that it is taken from the judgment rendered in the action and also from the order for judgment is not duplicitous, as it amounts to an appeal from the judgment only. Enderlien v. Kulaas, 385.

7. A notice of appeal is not invalid because the title thereof contains the name of only one of the three copartners composing a firm which is a party to the action, where the notice in all other respects sufficiently described the action in which the appeal was taken, and the adverse party could not have been misled by the defective designation. Enderlien v. Kulaas, 385.

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9. A new and correct undertaking may, upon application after appeal, be substituted for a defective one. Enderlien v. Kulaas, 385.

10. A defective undertaking on appeal may be amended or a new undertaking filed under N. D. Rev. Codes 1905, § 7224, even though the time for appealing has expired, if the appeal was taken in good faith. W. T. Rawleigh Medical Co. v. Laursen, 63.

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11. A motion in the supreme court to strike out the statement of the case from the abstract for failure to conform strictly to rule 7 (10 N. D. xlii), requiring the evidence to be reduced to a narrative form, will be denied, where the testimony is very brief and consists of but a few printed pages. Houston v. Minneapolis, St. P. & S. Ste. M. R. Co. 469.

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12. The question of the sufficiency of a complaint to state a cause of action is not challenged by assignments of error merely attacking certain findings as not supported by the evidence. Dickinson v. White, 523.

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13. It is not in itself a sufficient ground for the dismissal of an appeal that the appellant has failed to include in his abstract all of the evidence and exhibits necessary to a proper consideration of the case. W. T. Rawleigh Medical Co. v. Laursen, 63.

14. The provision of § 7231, Rev. Codes 1905, that "unless continued for cause" all civil cases appealed to the supreme court "shall be heard at the next succeeding term" when the appeal is taken sixty days before the first day of the term, is not self-operative; so that, where such an appeal is taken sixty days before the first day of the succeeding term, and appellant fails to serve and file his abstract in time for that term, and no motion is made to dismiss on that ground at such term, the court is not bound by the provision to treat the appeal as abandoned because no steps were taken in the matter at such term; but the court may upon a proper showing at the next succeeding term, the abstract in the interim having been filed and served, excuse the delay. W. T. Rawleigh Medical Co. v. Laursen, 63.

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15. Where one has been relieved, upon terms, of a default judgment, under N. D. Rev. Codes 1905, § 6884, and no appeal is taken from the portion of the order excusing the default, but only from the part imposing the terms, on the appeal the court cannot consider the correctness of the excusing of the default, but will consider only whether the terms imposed are just. North Dakota Co. v. Mix, 81.

16. After entry of judgment dismissing an action, the question of the action of the trial court in denying a motion for leave to file and serve a supplemental complaint, made prior to entry of judgment, becomes a moot question, and the supreme court will not determine an appeal from such an order. State ex rel. Miller v. Albertson, 206.

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17. The presumption that the findings of the trial court are right does not prevail in a trial *de novo* of an equity case, on an appeal under N. D. Rev. Codes 1905, § 7229. Englert v. Dale, 587.

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18. Trial courts have, under N. D. Rev. Codes 1905, § 6884, authorizing them in their "discretion and upon such terms as may be just" within a year after notice thereof to relieve a party from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect, a wide discretion the exercise of which is not to be disturbed except for abuse thereof in the matter of allowing the terms upon which such relief is given. North Dakota Co. v. Mix, 81.
19. The refusal of a trial judge to dismiss an action brought to trial more than five years after the institution thereof is an abuse of discretion, where the only excuse for the failure to bring the case to trial within the time prescribed by N. D. Rev. Codes 1905, § 6999, is that an affidavit of prejudice on the part of the judge who first considered the case was filed, and the presumption that he performed his duty in attempting to secure another judge to try the case. Donovan v. Jordan, 617.

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20. The findings of the trial judge, where a jury is waived, must be given the same weight and effect as the verdict of a jury. Taute v. J. I. Case Threshing Mach. Co. 102.

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21. Every person is entitled to a legal trial, and, in a jury case, to a verdict which has been reached by a fair submission of the evidence and the law of the case to the jury, and when this has not been done the supreme court cannot say that justice has been done, but must hold that the verdict has been reached by illegal means. Hintz v. Wagner, 110.
22. No prejudice is worked by allowing plaintiff at the conclusion of his case to amend his complaint by adding an allegation and prayer for exemplary damages, where the complaint alleges, and the proof shows facts authorizing a recovery of such damages, as they could have been recovered without the amendment. Harmening v. Howland, 38.
23. The erroneous admission, on behalf of the plaintiff in a personal injury case, of incompetent evidence by a medical expert, is not technical error, but error going to the vital elements of the issues, where such evidence goes to some extent to the fact of the injury and very largely to the amount of recovery, and the reviewing court cannot determine that, had it been excluded, the jury would have arrived at the verdict which it found. Hintz v. Wagner, 110.

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24. It is error in a personal injury case to admit evidence that, the plaintiff being unable to perform her household duties on account of the injury, it became necessary for a daughter to aid her in doing the work, where no definite value is fixed on the services of the daughter, and the condition of the evidence on the subject makes it possible for the jury to include the value of her services in the verdict. Hintz v. Wagner, 110.

25. The error of admitting, in a personal injury case, expert medical testimony as to the character, extent, effect, and permanency of the injury, which is incompetent because based merely upon the examination of the party by the expert, during the trial and for the sole purpose of qualifying as an expert, some eighteen months after the injury, when there were no physical indications of it, and upon what the party then told the expert about the history of her condition since the injury,—is not cured by the introduction in evidence of prescriptions given by the doctor, where they were for medicines suitable for ailments which might have arisen from one or more of many different causes. Hintz v. Wagner, 110.

26. Although it is improper to instruct with reference to a ground of recovery practically abandoned by plaintiff, such instruction is not prejudicial to defendant, where the jury by applying it to the evidence cannot, by reason of there being no evidence in support of the theory, possibly find thereunder in plaintiff's favor. Huffman v. Bosworth, 22.

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27. A reversal on technical error is a reversal on error not going to the substance of the issues or to the substantial rights of the parties. Hintz v. Wagner, 110.

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28. The contestee can recover the fees of the office, in an action upon the supersedeas undertaking given by the contestant to secure their payment during the time the contestant remains in the office and performs its duties. Lauder v. Heley, 274.

29. An undertaking given in an election contest proceeding, conditioned for the payment to the contestee of a specified sum per month while he shall be kept out of office, by reason of the granting to the contestant of a supersedeas order in the election proceeding, becomes operative, though no appeal is ever taken in the contest proceeding. Lauder v. Heley, 274.

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30. A transaction by which an election contestant procures a supersedeas order, against the contestee's objection, and executes the required undertaking conditioned for the payment to the contestee of a specified sum per month, stipulated to be the sum that the office was worth, during the pendency of the supersedeas, does not amount to a contract by the contestee to permit the contestant, in consideration of the undertaking, to remain in the office, and is not an assignment of its fees. Lauder v. Heley, 274.

31. An election contestant, having received benefits under a supersedeas order granted, on his application, upon condition that he furnish an undertaking conditioned for the payment to the contestee of a specified sum per month during the pendency of such supersedeas, cannot urge a defense to a suit on the undertaking, based upon the alleged illegality of the order and consequent failure of consideration of the undertaking. Lauder v. Heley, 274.

32. An appeal bond is also a supersedeas bond, and not a cost bond merely, and its obligation is not limited to only $250, where the obligors agree to pay the amount directed to be paid by the judgment, if it is affirmed, and all damages awarded against the appellant on the appeal, and further undertake to pay all costs and damages awarded against the appellant on the appeal, not exceeding the sum of $250. Investors' Syndicate v. Pugh, 490.

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2. The provision of § 507, Rev. Codes 1905, that, in the case of a disbarment proceeding initiated by an individual, the accusation must be "sworn to" by the person making it, does not make it a ground for a dismissal of the proceeding, that the verification is not made entirely upon positive knowledge, where it is partly upon such knowledge, and is far above being a verification upon mere information and belief, and presents a showing deemed sufficient, in the discretion of the court, to justify an investigation. Re Lynn, 54.

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In special city election, see Municipal Corporations, 14–16.

BANKRUPTCY.

1. Where property is seized under a writ of attachment, and thereafter the debtor institutes bankruptcy proceedings in which the property is scheduled but set apart as and for the exemptions of such debtor, and he is adjudged bankrupt, the lien of the attachment is not avoided, since the Federal bankruptcy act of 1898, 30 Stat. at L. 565, chap. 541, U. S. Comp. Stat. 1901, p. 3450, avoids liens upon property which passes to the trustee in bankruptcy and over which the bankruptcy court could assume and has assumed jurisdiction, and by setting aside property as exempt such court disclaims any intention of ever assuming or having assumed jurisdiction over it, and it cannot be said to have passed at any time to the trustee. First International Bank v. Lee, 197.

BANKRUPTCY—continued.

DISCHARGE OF BANKRUPT.

2. The effect of a discharge in bankruptcy is personal to the bankrupt. First International Bank v. Lee, 197.
3. An attorneys' lien fixed by the docket entry provided for by subdivision 4 of § 6293, Rev. Codes 1905, upon a judgment entered in favor of his client, carries with it imputed notice to the judgment creditor, and works *pro tanto* such an equitable assignment of the judgment to the attorney as to make his interest therein and right to use the judgment to collect his lien survive, unbarred, the subsequent discharge of the judgment debtor in voluntary bankruptcy proceedings, in which the judgment is listed to the judgment creditor without any reference to the attorneys' lien thereon, and of which the attorney has no notice. Lown v. Casselman, 44.

BANKS AND BANKING.

Personal tax on, see Injunction, 2; Taxes, 1.
Right to restrain distress to pay over assessment, see Parties, 2.
Tax on national bank stock, see Taxation, 1, 2.

1. That a loan made by a national bank upon real estate security is in violation of § 5137, U. S. Rev. Stat. ed. 1878, U. S. Comp. Stat. 1901, p. 3460, makes it voidable, and not void; and objection can be raised by the sovereign alone and not by the debtor as a defense, nor by an officer or agent sought to be held liable by the bank for releasing such a debt for less than its face value. First Nat. Bank v. Messner, 263.
2. A bank which receives from a county treasurer twenty-six checks, signed in the name of the county, made by him payable to the bank, in payment of his personal indebtedness, is thereby charged with knowledge of the fact that the money belonged not to the treasurer personally, but to the county. Northern Trust Co. v. First Nat. Bank, 74.
3. A bank in which a city treasurer has deposited for collection a fraudulent county warrant which was repudiated by the county, has the legal right, both as against the city and the treasurer's surety, to charge the credit off the treasurer's account. Dickinson v. White, 523.

BEST EVIDENCE. See Evidence, 7, 8.

BIDS.

At foreclosure sale, see Mortgages, 6, 7, 16.

BILLS AND NOTES.
Note as payment for corporate stock, see Corporations.

BOARDS.
State board of tax commissioners, see Taxation, 3–5.

BONDS.
On appeal, see Appeal and Error, 8–10, 28–32.
Amount paid to surety company for executing appeal bond, as taxable costs, see Costs, 7.
Right to interest in excess of penalty of, see Damages, 1.
Estoppel to claim liability on, see Estoppel.
Interest on, see Interest, 1.
Of officers, liability on, see Municipal Corporations, 1–5; Officers, 2, 3.
Of municipality, see Municipal Corporations, 6–18.
Subrogation of surety on, see Subrogation.
Of warehousemen, see Warehousemen.

BRIEFS.
Costs for printing, see Costs, 5.

BURDEN OF PROOF.
As to contributory negligence at railroad crossing, see Railroads, 3.

CANCELATION OF INSTRUMENTS.
Rescission of contracts, generally, see Contracts, 2, 3.

PLEADING.

1. The allegation in a complaint for the rescission of a contract for fraud, that one of the plaintiffs was "mentally incapable of transacting business," will not be regarded as a ground for decreeing a rescission of the contract, but as a fact which went to show the fraudulent conduct of defendants in inducing plaintiffs to sign the contract. Sneve v. Schwartz, 287.
2. Where a complaint, in a suit for a cancelation of a deed and for damages for false and fraudulent representation which induced plaintiffs to enter into an executory contract for exchange of property, shows that the defend-

CANCELATION OF INSTRUMENTS—continued.
ants parted with nothing of value, it is unnecessary to allege that they have been placed *in statu quo*. Sneve v. Schwartz, 287.
3. An objection to a complaint in a suit for cancelation of a deed and for damages for false and fraudulent representations which induced plaintiffs to enter into an executory contract for exchange of property, that no fraud could have been inflicted upon plaintiffs by the making of an executory agreement, is insufficient, where the complaint alleges that the contract is still in existence, and that defendants are unable to perform their part of it because they have never owned the property they have agreed to convey, the fraud alleged is sufficient to justify setting aside the contract itself, and there is a further allegation that the defendants wrongfully obtained possession of a deed to plaintiffs' land. Sneve v. Schwartz, 287.

CARLISLE TABLES.
Judicial notice of, see Evidence, 1.
Admissibility in evidence, see Evidence, 19.

CARRIERS.
1. A railroad is not liable for the wrongful arrest of a passenger, at the instance of a conductor, about five minutes after he alighted at his destination and while he was standing on the depot platform conversing with his companions, for an alleged violation, while on the train, of N. D. Laws 1911, chap. 228, prohibiting the drinking of intoxicating liquors upon a train, and making it the duty of conductors to arrest violators, independently of the question whether, at the time of such arrest, plaintiff's status as a passenger had ceased, so as to exonerate the railroad from any duty as a carrier towards him, as the conductor was not at the time acting for the railroad, but as a policeman for the state. Houston v. Minneapolis, St. P. & S. Ste. M. R. Co. 469.

CARRIERS OF FREIGHT.
2. To recover of a carrier for the loss in transit of a portion of grain shipped in bulk, the shortage must be established by a fair preponderance of the evidence. Morris v. Minneapolis, St. P. & S. Ste. M. R. Co. 136.
3. Proof of shortage in the delivery by the carrier to the consignee of grain shipped in bulk may be made by evidence of the weight of the grain when delivered to the carrier and evidence of its weight at destination, when the proof of the weights is reasonably certain and satisfactory. Morris v. Minneapolis, St. P. & S. Ste. M. R. Co. 136.
4. Where, in an action against a carrier to recover for barley alleged to have

CARRIERS—continued.

been lost in transit from a carload thereof shipped, a prima facie case of the loss of some barley sufficient to take the question to the jury is established by evidence that the grain was weighed when taken into the elevator and again when loaded therefrom into the car, the weights corresponding, the elevator agent testifying that the scales balanced, that he loaded the entire car in one transaction, that he had been in charge of the elevator and similar work at the place for the prior two months, that he knew how to use the scales, that the weights taken were correct, that some twenty different weighing operations were necessarily made in loading the car, that the total of these weights was 62,440 pounds, that the car was then immediately sealed and taken charge of by the carrier, that on its arrival at the destination the grain was weighed in bulk, the state weighmaster's certificate showing but 57,840 pounds as the amount delivered by the carrier to the consignee, and the testimony of the assistant weighmaster who issued the same, that he knew the scale was in good condition and weighed correctly because of its having been tested a short time previously and found O. K., and that the number of pounds set out in the certificate was the actual number contained in the car at the time,—the question must remain for the jury, notwithstanding it additionally appears that the car was, upon arrival at the destination, in good condition and sealed. Morris v. Minneapolis, St. P. & S. Ste. M. R. Co. 136.

5. The plaintiff in an action against a carrier to recover for barley alleged to have been lost in transit from a carload thereof shipped, who introduces evidence that the grain was weighed when taken into the elevator and again when loaded therefrom into the car, the weights corresponding, the elevator agent testifying that the scales balanced, that he loaded the entire car in one transaction, that he had been in charge of the elevator and similar work at the place for the prior two months, that he knew how to use the scales, that the weights taken were correct, that some twenty different weighing operations were necessarily made in loading the car, that the total of these weights, the amount of the barley put into the car, was 62,440 pounds, and that the car was then immediately sealed and taken charge of by the carrier, that on arrival of the car at the destination the grain was again weighed in bulk, the state weighmaster's certificate showing but 57,840 pounds as the amount delivered by the carrier to the consignee, and the testimony of the assistant weighmaster who issued the same, that he knew the scales were in good condition and weighed correctly because of their having been tested a short time previously and found O. K., and that the number of pounds set out in the certificate was the actual number contained in the car at the time,—establishes a prima facie case of the loss of some grain during transit sufficient to take the question to the jury, and upon which the plaintiff would be entitled to a finding by the jury

CARRIERS—continued.

upon the question of loss, and, if found, the amount thereof, under instruction that the jury might consider, with the evidence, matters of which judicial notice might be taken, including the possibility of mistake in weights at either end, the interest, if any, of the witnesses, natural shrinkage or loss of weight in handling, or any other facts known or which might be proven which might enter in to explain the discrepancy in the weights. Morris v. Minneapolis, St. P. & S. Ste. M. R. Co. 136.

CASE.

On appeal, see Appeal and Error, 11.

CERTIFICATE.

Mandamus to compel making of additional certificate to judgment roll on appeal, see Mandamus.

CERTIORARI.

Certiorari will not lie, under N. D. Rev. Codes 1905, § 7810, to the supreme court, to review the refusal by a county court of a change of venue, as such refusal is appealable. Squire v. County Ct. 468.

CHANGE OF VENUE.

Certiorari to review refusal of, see Certiorari.

Of action before justice of the peace, see Justice of the Peace, 2–4.

CITY. See Municipal Corporations.

CITY TREASURER.

Conclusiveness of admissions by, against sureties on bond of, see Evidence, 12–14.

Liability on bond of, see Municipal Corporations, 2–5.

CLOUD ON TITLE.

Action to remove, as collateral attack on administrator's sale of land, see Executors and Administrators, 2.

Conclusiveness of adjudication in action to remove, see Judgment, 18.

Use plaintiff as real party in interest, see Parties, 1.

See Quieting Title.

COLLATERAL ATTACK.
On sale of land by administrator, see Executors and Administrators, 2; Judgment, 17.
On judgment, see Judgment, 12–17.

CONCLUSION OF LAW.
In pleading, see Pleading, 3.

CONDITIONS.
Abuse of discretion in imposing, on setting aside judgment, see Appeal and Error, 18.
Imposition of, on vacating judgment by default, see Judgment, 7–9.

CONFIRMATION.
Of appointment of tax commissioners, see Taxation, 4, 5.

CONSIDERATION.
For contract of guaranty, see Guaranty, 1, 2.
For mortgage, see Mortgages, 3, 4.

CONSTITUTIONAL LAW.
Sufficiency of title of statute, see Statutes, 1.

N. D. Rev. Codes 1905, §§ 4456, 4457, which authorize the giving of surety company bonds upon appeal and the taxing of the cost thereof, but make no allowance for the cost of bonds given by private individuals, are not unconstitutional as being class legislation. Investors' Syndicate v. Pugh, 490.

CONSTRUCTION.
Of contracts, see Contracts, 1, 2.
Of pleading, see Pleading, 1, 2.
Of statute, see Statutes, 2.

CONTEST.
Of election, liability on supersedeas undertaking given by contestant, see Appeal and Error, 28–31.

CONTINUANCE.
Presumption of, see Evidence, 3.

CONTRACTS.
Cancelation of, see Cancelation of Instruments.
For exchange of property, see Exchange of Property; Fraud and Deceit.
Of guaranty, see Guaranty.
Injunction against carrying out of illegal contract, see Injunction, 1.
Specific performance of, see Specific Performance.
For public printing, see States, 1, 2.
For exchange of property, duty to accept, see Vendor and Purchaser, 2.

CONSTRUCTION.

Of contract for public printing, see States, 2.

1. The character of a contract is governed by its terms and conditions, rather than by the name applied to it by the parties thereto. State ex rel. Miller v. Hall, 85.

RESCISSION.

2. The prompt commencement of an action to rescind an executory contract for the exchange of property, upon discovery of fraud, is sufficient notice of an election to rescind the contract, where it appears that the other party has parted with nothing of value. Sneve v. Schwartz, 287.
3. An action to rescind an executory contract for the exchange of property, begun forty-four days after the expiration of the time for depositing a deed in escrow and furnishing an abstract of title, is promptly begun, where the plaintiffs would desire to make inquiry as to the reason why the deed had not been deposited and as to whether title to the property was in defendants, to investigate and ascertain whether other material statements made to them to secure their consent to the contract were misrepresented, and whether defendants were financially responsible, to aid them in electing whether to sue for damages or rescind, and time would be needed to consult an attorney, and for the attorney to investigate the facts sufficiently for the purpose of drawing a proper complaint. Sneve v. Schwartz, 287.

CONTRIBUTORY NEGLIGENCE.

At railroad crossing, see Railroads, 3–5.

CORPORATIONS.

Personal tax on, see Injunction, 2; Taxes, 1.
Municipal corporations, see Municipal Corporations.
Right to restrain distress to pay over assessment, see Parties, 2.
Tax on corporate stock, see Taxation, 1, 2.

Payment for Stock.

1. The words "shall be considered," in N. D. Rev. Codes 1905, § 4196, providing that no note or obligation given by a stockholder shall be considered as payment for stock, means that when a note is given it shall not, in law, effect a payment. German Mercantile Co. v. Wanner, 479.
2. A note is "property," and is not included in the prohibition in N. D. Const. § 138, against the issuance of stock by any corporation except for money, labor done, or money or property actually received. German Mercantile Co. v. Wanner, 479.
3. A note given to a corporation for shares of its capital stock is, like a subscription or a check given for the same purpose, a promise to pay for such stock, and does not constitute payment therefor, nor relieve the stockholder, or the party entitled to stock, from his obligation to make actual payment as provided by N. D. Rev. Codes 1905, § 4196. German Mercantile Co. v. Wanner, 479.
4. The purchaser of stock in a corporation which has been duly organized and is a going concern is liable to the corporation for such part of the value of the stock so purchased as has not actually been paid in cash or its equivalent, and such indebtedness may be collected. German Mercantile Co. v. Wanner, 479.

COSTS.

Bonds given to secure, see Appeal and Error, 32.
Pendency of motion to require security for, as extending time for answering or demurring, see Judgment, 3.

1. It is proper, where a trial judge in a suit in equity appoints a court stenographer to take and report testimony in accordance with a stipulation by the parties, to allow to the stenographer the fees allowed to a referee by N. D. Rev. Codes 1905, § 2608, and to tax them as costs and disbursements in the proceedings. Investors' Syndicate v. Pugh, 490.

COSTS—continued.

Persons Liable.

2. The mortgagee cannot tax, in a foreclosure proceeding, a fee for additional defendants, under N. D. Rev. Codes 1905, § 7174, as against an intervener who does not defend against the foreclosure, but claims title to the mortgage and prays that it be decreed to belong to him, as the intervener is not concerned with the additional defendants. Investors' Syndicate v. Pugh, 490.

3. Although in a foreclosure proceeding, the foreclosure attorneys' fees provided for by N. D. Rev. Codes 1905, § 7176, exclude the taxable statutory costs of $10 before, and $3 after, notice of trial provided for in § 7174, as between the mortgagee and the mortgagor, such costs can properly be recovered against, and are the only attorneys' fees recoverable against, an intervener who does not defend against the foreclosure, but claims title to the mortgage and seeks to have it assigned to him. Investors' Syndicate v. Pugh, 490.

On Appeal.

4. An allowance for disbursements in making a transcript, including exhibits and binding, on an appeal to the supreme court, is allowed under N. D. Rev. Codes 1905, § 7177, as taxable disbursements, and is not covered by § 7174, which relates to statutory costs, and not to disbursements. Investors' Syndicate v. Pugh, 490.

5. An allowance of $534.50 for printing briefs and abstract on appeal is reasonable, where of the 1052 pages of the abstract, 800 are devoted to a reproduction of the pleadings, direct testimony and cross-examination, and exhibits of the objecting party, the cost of printing which, if the legal rate had been charged, would have amounted to $800. Investors' Syndicate v. Pugh, 490.

6. The amount paid to the clerk of the district court for copying exhibits used on appeal to the supreme court is properly allowed as a disbursement, under N. D. Rev. Codes 1905, § 7177, providing that the clerk may tax the legal fees of witnesses and of referees and other officers, § 2584, ¶ 11, authorizing the clerk to charge for making certified copies or abstracts of judgments or other papers filed in his office, and supreme court rule 15 (10 N. D. xlvii, 91 N. W. ix), providing that documents on file in the case and original exhibits, offered in evidence, or properly certified copies thereof, shall be attached, and must be made a part of the statement of the case. Investors' Syndicate v. Pugh, 490.

7. The giving of surety company bonds upon appeal is authorized by N. D. Rev. Codes 1905, §§ 4456, 4457, and the cost thereof may, under such statutes, be included in the taxable costs and disbursements in the proceeding;

COSTS—continued.

but the amount taxed cannot exceed 1 per cent of the penalty or liability, no matter how much actually was paid, or was necessary to be paid, for such bonds. Investors' Syndicate v. Pugh, 490.

COUNTY TREASURER.

Notice to bank that money paid it by county treasurer belongs to county, see Banks and Banking, 2.

Liability on bond of, see Officers, 2, 3.

Subrogation of surety on bond of, see Subrogation.

COURTS.

Justice of the peace, see Justice of the Peace.

An application to the supreme court for a writ of mandamus directed to the state auditor, to require him to credit to the account of the state board of tax commissioners, the appropriation provided by N. D. Laws 1911, chap. 303, and to issue warrants upon the state treasurer to pay the salaries and meet the expenses of a tax commission, involves the prerogatives, rights, and franchises of the state government, and invokes the original jurisdiction of the supreme court. State ex rel. Birdzell v. Jorgenson, 539.

CREDIBILITY.

Cross-examination of witness for purpose of affecting, see Witnesses.

CRIMINAL LAW.

Various particular crimes, see Homicide.

Impaneling of jury, see Jury.

Cross-examination of witnesses, see Witnesses.

TIME TO DEMUR, ANSWER, OR PREPARE FOR TRIAL.

1. A request for permission to prepare and serve a demurrer to an information made after plea comes too late and its denial is proper, since such a demurrer must be entered in advance of plea. State v. Kelly, 1.

2. A defendant cannot by requesting, in advance of his arraignment, delay in which to plead, bring himself within the protection of §§ 9889 and 9890, Rev. Codes 1905, which provides that if on arraignment the defendant requests it he must be allowed certain time to answer the information or

CRIMINAL LAW—continued.

indictment after which "he may, in answer to the arraignment," move the court to set aside the information or indictment, or may demur or plead thereto. State v. Kelly, 1.

3. A request by a defendant in a misdemeanor trial for permission to prepare and serve a demurrer to the information is not a request for time to prepare for trial within the meaning of § 9935, Rev. Codes 1905, providing that "after his plea the defendant, if he requests it, is entitled to at least one day to prepare for trial." State v. Kelly, 1.

EVIDENCE.

4. An expert medical witness may give an opinion based upon the testimony of other witnesses as to material facts concerning which there is no dispute, and such testimony does not invade the province of the jury. State v. Reilly, 339.

5. The foundation necessary to show the competency of a doctor as an expert witness is laid where he testified that he was a graduate of a certain university, had practised in a certain locality for eighteen years, had treated all kinds of ailments and sicknesses, had performed surgical work, and had been coroner, it being immaterial whether or not he was a graduate of a medical school, or had been licensed to practise in the state. State v. Reilly, 339.

6. Where an alleged crime of statutory rape may have been committed by the defendant upon his daughter while his wife and other children were away on a visit, and the evidence on the part of the state tended to show that the prosecutrix was kept at home for that purpose, the defendant should have been allowed to prove by the explicit testimony of his wife that the prosecutrix was in fact detained for other specific reasons, due to information regarding her unchastity and ungovernable disposition. State v. Apley, 298.

7. Where a physician was allowed to testify fully on cross-examination as to whether a particular wound in an intentional abortion could have been caused by the woman herself, it was not error to refuse to allow an answer to another question as to whether intentional abortions spoken of were performed by the woman herself, and were often done by certain designated instruments, as the point in issue was not what other women had attempted, but whether a wound of the size and nature of that in question could have been inflicted by the deceased herself. State v. Reilly, 339.

8. Where, in a trial for murder in procuring an abortion, there is no pretense or defense that the miscarriage was necessary to preserve the life of the deceased, but the defense consists in a denial that the miscarriage was

CRIMINAL LAW—continued.

accomplished at all, no direct proof as to the necessity is incumbent on the state. State v. Reilly, 339.

9. Where, in a trial for murder in procuring an abortion, a number of medical witnesses testified to the evidences of a recent abortion, and that such abortion was the occasion of the death of the deceased; and other evidence showed that there was an opportunity for its performance; that an operation had been made which was concealed from physicians called into consultation; that there was no necessity to bring about a miscarriage, owing to the fact that the deceased was a healthy woman; and the defense was that no miscarriage had been produced by the defendant,—the evidence was sufficient to sustain the verdict of guilty. State v. Reilly, 339.

INSTRUCTIONS.

Prejudicial error in giving, see infra, 22, 23.

10. Where, in a trial of murder while procuring an abortion, there are a number of witnesses, an instruction that "if any witness has been shown to have wilfully and knowingly testified falsely in regard to some material matter, you are at liberty to disregard his testimony entirely unless corroborated by credible testimony," does not single out the defendant or his testimony. State v. Reilly, 339.

11. An instruction in a trial for murder while procuring an abortion, that "if any witness has been shown to have wilfully and knowingly testified falsely in regard to some material matter, you are at liberty to disregard his testimony entirely unless corroborated by credible testimony," is not objectionable because it omits the qualifying clause, "unless corroborated by the facts and circumstances on the trial." State v. Reilly, 339.

12. An instruction in a trial for murder in procuring an abortion, that a witness had gone on the stand and given her testimony, and that the defendant through the case charged her with being an accomplice in the crime, "if any crime was committed," is not objectionable as stating or inferring that defendant admitted his participation in the crime by reason of calling her an accomplice. State v. Reilly, 339.

13. An instruction on a trial for homicide while producing an abortion is not objectionable in assuming that a crime was committed, where words of the court stating that the defendant charged a certain witness with being an accomplice in the crime were expressly qualified by using the words, "if any crime was committed," as the instruction should be taken as a whole. State v. Reilly, 339.

CRIMINAL LAW—continued.

Motions for New Trial.

14. Newly discovered evidence which is merely cumulative, and does not tend to make a doubtful case clear, is not ground for a new trial. State v. Reilly, 339.

15. A new trial will not be granted where a notice of intention to move for a new trial was given in the trial court, but the motion was in fact never made by the defendant, and never presented by him for decision. State v. Reilly, 339.

Appeal.

16. An appellant from a conviction for embezzlement who, largely as a result of his leaving the state and failing to keep his counsel advised as to his whereabouts, has failed to take advantage of a considerable extension of the time in which he might transmit the record on appeal and file and serve abstract and brief, is in no position to ask for further time in which so to do, at least where on his former applications for extension the court has examined and found to be without merit the one point by him relied upon for a reversal. State v. Sund, 59.

— Presentation and Reservation in Lower Court of Grounds of Review.

17. An objection to a question regarding the custom of one physician when he calls another in a serious case, as to what he usually does, and whether he tells him everything he knows about the case, on the ground that it was incompetent, irrelevant, and immaterial, no foundation laid, and not in any way binding on the defendant, is not sufficient to suggest that there was a local custom different from the general custom which is supposed to be followed. State v. Reilly, 339.

18. An objection that a hypothetical question put to a doctor was "incompetent, irrelevant, and immaterial, no foundation laid, and an improper question, —improper to ask for the opinion of the doctor,"—is too general to show that the doctor was giving an opinion on an opinion, or that the question did not assume the truth of the testimony or the facts referred to. State v. Reilly, 339.

19. Where the trial judge submits a written charge to the jury, and states that he will permit the defendant to consider the charge the same as if it had been delivered orally and save to him his right to file exceptions thereto the same as if it were an oral charge, exceptions must be filed, under §§ 9987, 9988, and 10078 of Rev. Code of 1905, with the clerk of the court within twenty days after the instructions are filed, or the right thereto

CRIMINAL LAW—continued.

is waived, but such limitation as to time of filing exceptions may be waived by the court by extending the time. State v. Reilly, 339.

— RECORD.

20. Jurisdiction over a case on appeal is lost so that the decision cannot be reviewed when the remittitur has gone down and been filed in the trial court, unless it be under extraordinary circumstances, such as in the case of fraud in the securing of the transmission of the remittitur, or mistake or inadvertence in transmitting it. State v. Sund, 59.

— HARMLESS ERROR.

21. It is not material error to refuse to admit cumulative evidence on matters which are not in dispute in a criminal trial for abortion against the physician who performed the operation. State v. Reilly, 339.

22. An instruction on a trial for homicide while producing an abortion is not erroneous or prejudicial in defining the word "feloniously," where it states that "the term 'feloniously' applies to the manner and intent with which an act is done and includes the commission of an act which, when done, would result in a felony as defined by our statutes." State v. Reilly, 339.

23. An instruction in a prosecution for homicide while producing an abortion is not prejudicial which states: "It is not your fault that this prosecution is commenced or that a crime has been committed, and if a crime has been committed by the defendant at the time and place and in the manner and form charged, then he has no right to ask or expect at your hands anything else than a verdict saying so, nor has the state the right to ask a conviction of a person who has not committed a crime,"—although it tells the jury that a crime has been committed, as it would be a crime even if the deceased herself committed the act, especially where the error, if any in suggesting that the crime referred to was the crime charged against the defendant, has been cured by other portions of the charge to the effect that the defendant was entitled to every presumption of innocence compatible with the evidence in the case, and that if it was possible to account for the death of the deceased upon any reasonable hypothesis other than that of the guilt of the defendant, they should find the defendant not guilty; and the record showed that the defendant himself, in his instructions which he requested, took the position that a crime had been committed. State v. Reilly, 339.

CROSS-EXAMINATION.

Of witness, see Witnesses.

CUMULATIVE EVIDENCE.

As ground for new trial, see Criminal Law, 14.

Exclusion of, as ground for reversal, see Criminal Law, 21.

DAMAGES.

1. The fact that the recovery against a surety, including interest, exceeds the penalty of the bond, does not render the allowance of interest unwarranted. Dickinson v. White, 523.
2. Substantial damages may be recovered by the beneficiaries for the wrongful death of a single man twenty-six years of age, who lived at home with his father and mother and four other children, where he turned all his earnings, amounting to $4 per day into the family fund for the support of the family, and a verdict of $2,000 is not excessive, where the expectancy of his life was thirty-seven years, and of the father, mother, and two children under age, nineteen years, twenty-two years, forty-five years, and forty-two years, respectively, although he was under no legal obligation to support the family. Rober v. Northern P. R. Co. 394.

EXEMPLARY DAMAGES.

Permitting amendment of pleading so as to claim, see Appeal and Error, 22.

3. Exemplary damages may be recovered under a claim for damages generally where the complaint alleges, and the proof shows, facts authorizing the recovery of exemplary damages. Harmening v. Howland, 38.
4. Recovery of exemplary damages for injury by fraud and deceit may be had in some cases without proof of actual malice. Harmening v. Howland, 38.
5. There is sufficient foundation to warrant the allowance by the jury of exemplary damages in an action for fraud and deceit, where there is ample testimony tending to show that in committing the act complained of the defendant acted fraudulently and in total disregard of the plaintiff's rights, and through fraud and deceit intentionally induced the plaintiff to act upon the belief that material representations were true when the defendant knew them to be false. Harmening v. Howland, 38.

DEATH.

Measure of damages for causing, see Damages, 2.

DEBT.

Presumption of continuance of, see Evidence, 3.

DEBT LIMIT.
For city, election to increase, see Municipal Corporations, 6–18.

DECEDENT'S ESTATE.
Administration of, see Executors and Administrators.

DE FACTO OFFICERS.
Liability to *de jure* officer for salary or fees received, see Officers, 1.

DEFAULT.
Judgment by, see Judgment, 1–10.
Judgment by, before justice of the peace, see Justice of the Peace, 1.

DEFINITION.
Property, see Corporations.

DELAY.
As ground for dismissing action, see Dismissal.

DEMAND.
Necessity of, to start interest running, see Interest, 1.

DEMURRER.
To information, time for, see Criminal Law, 1–3.
Raising bar of limitations by, see Limitation of Actions.

DEPOSITIONS.
1. N. D. Rev. Codes 1905, § 7288, authorizes the taking of objections to testimony in a deposition upon the grounds of incompetency and irrelevancy at the time the deposition is offered in evidence. Great Western Life Assur. Co. v. Shumway, 268.
2. Although it is discretionary with the court to require the whole, if any, of a deposition to be read, the discretion is not absolute, and it is an abuse of the same in an action for the purchase price of personal property to refuse the request of plaintiff to read a portion of his deposition relating to the issue of nonpayment, where such portion offered embraces practically all of the deposition relating to the subject of nonpayment, and there is

DEPOSITIONS—continued.

nothing in the remainder tending to qualify or detract from the effect of the part offered, since while mere excerpts or fragmentary and isolated portions of a deposition may not be singled out and read, but the entire portion, if any, bearing upon the issue sought to be proved must be introduced, still a party is not obliged to offer the entire deposition but may read such portion thereof as is competent, relevant, and material to such issue. Bowen v. Durant, 11.

DISBARMENT.

Of attorneys, see Attorney and Client, 1, 2.

DISBURSEMENTS.

On appeal, see Costs, 4–7.

DISCHARGE.

Of bankrupt, see Bankruptcy, 2. 3.

DISCRETION.

Abuse of, see Appeal and Error, 18, 19.

In permitting part of deposition to be read in evidence, see Depositions, 2.

DISMISSAL.

Of appeal, see Appeal and Error, 13, 14.

Refusal to dismiss action as abuse of discretion, see Appeal and Error, 19.

Of disbarment proceedings, see Attorney and Client, 1, 2.

1. The mere fact that affidavits of prejudice on the part of a presiding judge were filed in a case, and the presumption that the presiding judge complied with the statute and attempted to get another judge to try the case, are not sufficient to rebut the presumption of unreasonable negligence of a party plaintiff in delaying for more than five years after the commencement of an action to bring it to trial. Donovan v. Jordan, 617.

2. Where the only excuse for delaying to prosecute a suit for more than five years after the institution thereof is that affidavits of prejudice on the part of the presiding judge were filed, and the presumption that the trial judge did his duty in attempting to get another judge to try the case, another trial judge has no discretion, under N. D. Rev. Codes 1905, § 6999,

DISMISSAL—continued.
in the absence of rebuttal affidavits, to refuse to dismiss the case upon motion, supported by affidavits, of the adverse party. Donovan v. Jordan, 617.

DOCKET.
Making attorney's lien effective by entering in judgment, see Attorney and Client, 3; Bankruptcy, 3.

DOCUMENTARY EVIDENCE. See Evidence, 15–19.

DOUBLE TAXATION. See Taxation, 2.

DURESS.
In execution of mortgage, see Mortgages, 1, 2.

ELECTIONS.
Liability on supersedeas undertaking given by contestant of election, see Appeal and Error, 28–31.
For increasing debt limit of city and issuing of bonds, see Municipal Corporations, 6–18.

1. N. D. Const. § 121, in defining the qualifications of an elector, does not prescribe a rule for voting, nor compel a qualified elector to necessarily vote at a place within the boundaries of the ward in which he resides, though every ward is by statute a voting precinct. Kerlin v. Devils Lake, 207.
2. Illegal votes which, if deducted from the affirmative and negative vote in the proportion that the affirmative and negative vote bears to the entire vote, will not change the result, will not invalidate an election. Kerlin v. Devils Lake, 207.
3. N. D. Penal Code 1905, § 8597, providing that every person who votes in an election precinct in which he does not reside, or in which he is not authorized by law to vote, is guilty of a misdemeanor, does not apply to an election held at one central voting place, instead of in each ward as an election precinct as required by statute. Kerlin v. Devils Lake, 207.

EMPLOYEES. See Master and Servant.

EQUITABLE ASSIGNMENT.
Of judgment to attorney holding lien, see Bankruptcy, 3.

ESTOPPEL.

By receiving benefits under supersedeas order, see Appeal and Error, 31.

The rule that a party seeking to enforce a contract void as against public policy cannot invoke an estoppel as against his adversary's attempted defense based on such fact is not applicable in a suit by an election contestee on an undertaking conditioned for the payment to the contestee of a specified sum per month, stipulated to be the sum that the office was worth, executed by the contestant pursuant to the conditions of a supersedeas order obtained by him over the contestee's protest. Lauder v. Heley, 274.

EVIDENCE.

Prejudicial error in admission of, see Appeal and Error, 23–25.

As to amount of freight delivered to and by carrier, see Carriers, 2–5.

In criminal prosecution, see Criminal Law, 4–9.

Sufficiency of objection to, see Criminal Law, 17, 18.

Permitting part of deposition to be read in evidence, see Depositions, 2.

Burden of proof as to contributory negligence at railroad crossing, see Railroads, 3.

Burden of proof in action to set aside mortgage for failure of consideration, see Mortgage, 3.

Of contributory negligence at railroad crossing, see Railroads, 3–5.

Striking out of, see Trial, 1.

JUDICIAL NOTICE.

1. The court will take judicial notice of the Carlisle mortality tables, and of the expectancy of life of one killed in an accident, and of the expectancy of the lives of beneficiaries in a suit for wrongful death of deceased. Rober v. Northern P. R. Co. 394.

PRESUMPTIONS.

As to criminal intent of person committing homicide while procuring abortion, see Homicide, 1.

2. All presumptions are in favor of the legality rather than the illegality of a transaction, so that if the proof is susceptible of two constructions, one of

EVIDENCE—continued.

which would render the transaction legal and the other illegal, it is the duty of the court, in case of grave doubt, to adopt the former. State ex rel. Miller v. Hall, 85.

3. In the absence of any showing to the contrary, it must be presumed that an indebtedness to his principal, admitted by an agent in a letter shortly prior to the termination of his agency, continued to exist not only at the time the agency contract was terminated, but also at the time of the commencement of a subsequent action on the agent's bond. Great Western Life Assur. Co. v. Shumway, 268.
4. There is a legal presumption that one who met his death by being run over by a switch engine at a public crossing on a dark, windy, and stormy night, did not commit suicide. Rober v. Northern P. R. Co. 394.
5. Where the remains of a man are found near a railway crossing in a city at night, there is no presumption that a murder was committed, and that the body was put upon the track to be run over by a switch engine operated up and down the yards. Rober v. Northern P. R. Co. 394.

RELEVANCY, MATERIALITY, AND COMPETENCY GENERALLY.

In criminal prosecution, see Criminal Law, 6, 7.

6. In an action for damages for breach of a plumbing contract, evidence relating to the subject of the cost of completing the job as contracted for and the profit on it, and as to distances, etc., which was intended to aid the jury in the estimation of damages, is admissible. Enderlien v. Kulaas, 385.

BEST AND SECONDARY EVIDENCE.

7. Evidence of the secretary of plaintiff relative to the state of the account between plaintiff and defendant, its agent, is not admissible, where no foundation was laid as to his qualifications to thus testify, and it appears that such account was kept in plaintiff's books, which are the best evidence. Great Western Life Assur. Co. v. Shumway, 268.
8. The fact that in making reports to a city council the city treasurer copied the data therein contained from the books kept by him as city treasurer does not render the reports inadmissible as secondary evidence, since, being made pursuant to official duties, they are originals, and not mere copies. Dickinson v. White, 523.

ADMISSIONS.

9. A letter by an agent to his principal, stating: "I have collected a specified amount and you have advanced a certain sum. Now, if I can get all this through it will not be so bad, and I will get what more in I can, as I

EVIDENCE—continued.

will have to get money before I can pay you the amount collected," is an admission of an indebtedness to the principal only of the amount stated to have been collected. Great Western Life Assur. Co. v. Shumway, 268.

10. A letter by an agent to his principal, stating that the former has collected a specified amount, and that he will have to get money before he can pay the principal the amount collected, when properly identified, is admissible, in an action on the agent's bond, as showing an indebtedness due from the agent to the principal on the date of the letter. Great Western Life Assur. Co. v. Shumway, 268.
11. The admission by an agent, in a letter, of an indebtedness to his principal, is binding on the agent's sureties, in an action on his bond. Great Western Life Assur. Co. v. Shumway, 268.
12. An admission by a city treasurer, that on a specified date, during his third term of office, he was short a certain amount in his accounts, is insufficient to warrant a finding that he embezzled such amount during that term, but it should be construed as meaning that such amount constitutes the total defalcations occurring in that and his prior terms. Dickinson v. White, 523.
13. Under the complaint in an action by a city upon the official bond of its treasurer to recover for alleged defalcations, alleging that he deposited to his credit as city treasurer a worthless county warrant, which was repudiated by the county and charged back against the account by the bank, his admission that he had used the city's money to the amount of the warrant and that the warrant was deposited to cover the shortage thereby occasioned, is competent. Dickinson v. White, 523.
14. The admission by a city treasurer, in an action by the city upon his official bond to recover for alleged defalcations, that he had used the city's money to the amount of a void county warrant deposited by him to his credit as city treasurer to cover the shortage thereby occasioned, is sufficient to justify a finding to the effect that there existed a shortage in his account with the city, on the date of the deposit of the warrant, of the amount thereof. Dickinson v. White, 523.

DOCUMENTARY EVIDENCE.

15. The method of proving documents in the departments of the United States government, prescribed by subdivision 8 of § 7300, Rev. Codes 1905, is not exclusive. Harmening v. Howland, 38.
16. Competent proof of the contents of the public documents of a local United States land office may be made by the production of the originals in court and the identification thereof as such by the register of the office. Harmening v. Howland, 38.
17. The method prescribed by §§ 2469, 2470 of the United States Revised Statutes,

EVIDENCE—continued.

U. S. Comp. Stat. 1901, p. 1557, for the proving of the public documents of the General Land Office, is not exclusive. Harmening v. Howland, 38.

18. Exhibits, one purporting to be a mere copy of plaintiff's ledger account with defendant, its agent, and the other merely a detailed account claimed to have been taken from plaintiff's books, are incompetent. Great Western Life Assur. Co. v. Shumway, 268.

19. Although the Carlisle mortality tables are admissible in evidence by virtue of § 7303 of the Code of North Dakota, in an action for wrongful death, to show the expectancy of the life of deceased and the expectancy of the lives of the beneficiaries, in order to aid the jury, such introduction is not necessary to a recovery of substantial damages. Rober v. Northern P. R. Co. 394.

OPINION EVIDENCE.

Saving for review question as to admissibility of evidence, see Appeal and Error, 5.

In criminal prosecution, see Criminal Law, 4, 5.

20. It is erroneous in a personal injury case to permit a medical expert to give testimony in the nature of an argument to the jury. Hintz v. Wagner, 110.

21. Testimony of a medical expert for the plaintiff in a personal injury case, who has examined her for the purpose of qualifying as a witness, that she could not deceive him as to her condition, is improperly received, the question being for the jury. Hintz v. Wagner, 110.

22. Testimony of a medical expert should in general be confined to the result of his actual investigations, and, when he has never been called to attend or prescribe for the party, should be limited to the conditions he finds on the examination and to his opinion based thereon. Hintz v. Wagner, 110.

23. As a general, though not inflexible rule, a medical expert who has never treated the injured party, and only makes an examination many months after the infliction of the injuries, and then solely for the purpose of qualifying to testify, may not give his opinion as to the injuries having caused the condition of the party and as to the extent and effect of the injuries, when such opinion is based largely upon the history of the case as given him by the injured party at such examination. Hintz v. Wagner, 110.

24. The expert testimony of a physician on behalf of plaintiff, in an action for personal injuries to her, as to the character, extent, effect, and permanency thereof, is incompetent because based largely upon hearsay and statements made under every temptation and opportunity to misrepresent, where, never having attended or prescribed for her, he makes an examination of her during the progress of the trial some eighteen months after the infliction

EVIDENCE—continued.

of the injury, when there are no outward evidences of the injury, solely for the purpose of qualifying as an expert, and bases his opinion upon the strength of what he found, what he made her tell him, her answers to his inquiries, what she said about the changes from time to time in the past, and her history of her condition since the injury. Hintz v. Wagner, 110.

25. The testimony of the secretary of plaintiff that the defendant, its agent, is indebted to plaintiff in a specified sum, is a mere conclusion, and therefore incompetent. Great Western Life Assur. Co. v. Shumway, 268.

WEIGHT AND SUFFICIENCY.

In criminal prosecution, see Criminal Law, 8, 9.

Sufficiency of evidence to go to jury as to master's liability to injured servant, see Master and Servant, 4, 5.

As to negligence at railroad crossing, see Railroads, 2.

26. The evidence is sufficient to sustain the finding of the jury that a contract for plumbing was mutually abandoned, where defendant testified that after learning that part of the work for sewer and water-main connection need not be done because of new city mains being constructed nearer than was contemplated by the contract, she told plaintiffs to stop work on the contract; that she requested a new contract a number of times; that one of the members of the firm agreed that the old contract was no good, and that he promised to make out a new one, but that he failed to do so, claiming he did not have time; that she got someone else to do the work, and that upon her demanding the bill a number of times she was finally told she would get it some day; and plaintiffs admitted in their testimony that they discontinued work at defendant's request, and that possibly she told them to stop further work until they had made an agreement as to what she was to pay for the job; and one of the plaintiffs testified that they did not have any agreement with her after they abandoned the contract, and a judgment for plaintiffs, notwithstanding the verdict, is error. Enderlien v. Kulaas, 385.

EXAMINATION OF WITNESSES.

Cross-examination, see Witnesses.

EXCEPTIONS.

Necessity for filing, see Criminal Law, 19.

EXCHANGE OF PROPERTY.

Pleading allegations as to fraud, see Fraud and Deceit.

Rescission of contract for, on ground of fraud, see Cancelation of Instruments.

Rescission of contract for, see Contracts, 2, 3.

Specific performance of contract for, see Specific Performance.

Conclusion of law in complaint, see Pleading, 3.

1. An allegation in a complaint that the property plaintiffs parted with was worth $20,000, and that they received nothing, is sufficient as an allegation of damages. Sneve v. Schwartz, 287.
2. An allegation that defendants did not have title to real estate they contracted to convey is sufficient though made on information and belief, where it was possible that defendants had an unrecorded deed to the premises. Sneve v. Schwartz, 287.

EXECUTORS AND ADMINISTRATORS.

Collateral attack on sale, see Judgment, 17.

1. The proceedings leading up to the sale of real estate by the administrator of the estate of an intestate under the authorization of the county court constitute a proceeding *in rem*. Shane v. Peoples, 188.
2. An attempt to have declared void a sale of land by the administrator of an estate and the decree of the county court authorizing and ratifying the same, even though made in the form of an action to quiet title, is a collateral attack upon the sale and the decree. Shane v. Peoples, 188.

EXEMPLARY DAMAGES.

Permitting amendment of pleading so as to claim, see Appeal and Error, 22.

See Damages, 3–5.

EXEMPTIONS.

In bankruptcy, see Bankruptcy, 1.

A claim for exemptions made by a married woman, a little more than seven months after levy on her husband's property and immediately after learning that her husband, who had been served with notice of the levy, had failed to make such claim, is made in time under N. D. Rev. Codes 1905, § 7124, requiring that notice of the levy shall be served on the debtor, his agent, wife, or child, and that the exemptions shall be claimed by the

EXEMPTIONS—continued.
debtor or such other person for him within three days after such service, and § 7122, providing that the debtor's wife or child may claim the exemption, if he fails to do so, without fixing any limitation as to the time for doing so. First International Bank v. Lee, 197.

EXHIBITS.
Costs for copying, see Costs, 6.
Admissibility in evidence, see Evidence, 18.

EXPERT EVIDENCE.
In criminal prosecution, see Criminal Law, 4, 5.
See Evidence, 21–24.

EXTENSION OF TIME.
Pendency of motion to require security for costs, as extending time for answering or demurring, see Judgment, 3.
To answer or vacate judgment by default, see Judgment, 10.

FAILURE OF CONSIDERATION.
For mortgage, see Mortgages, 3, 4.

FEES.
As costs, see Costs.
For filing affidavit of prejudice, see Justice of the Peace, 4.
De jure officer's right to fees received by *de facto* officer, see Officers, 1.

FILING.
Fees for filing of affidavit of prejudice, see Justice of the Peace, 4.

FINDINGS.
Conclusiveness of, on appeal, see Appeal and Error, 20.

FIRES.
Employer's liability for injury by fire started by an independent contractor, see Master and Servant, 8.

FORECLOSURE.
Of mortgage, costs on, see Costs, 2, 3.
Of mortgage, see Mortgages, 5–16.

FORMER ADJUDICATION. See Judgment, 18.

FRAUD AND DECEIT.
As ground for canceling instrument, see Cancelation of Instruments.
Notice of election to rescind contract for, see Contracts, 2.
Exemplary damages for, see Damages, 4, 5.
In obtaining mortgage, see Mortgages, 1.
Setting aside under power in mortgage for, see Mortgages, 12–15.

PLEADING.

1. Allegations that defendants wrongfully claimed to own land and nursery stock, and allegations regarding the magnitude of the nursery business, all of which statements are alleged to be false, are sufficient as statements of a *scienter*. Sneve v. Schwartz, 287.
2. Allegations in a complaint for damages for false and fraudulent representations in inducing plaintiffs to enter into a contract to exchange property, as to the earnings of a nursery company and contracts with corporations therewith, are material when read in connection with a contract attached to the complaint, which shows that the defendants agreed to convey a half interest in the nursery stock. Sneve v. Schwartz, 287.
3. An allegation in a complaint "that the only other consideration named in the said agreement for the conveyance of said premises to be conveyed by these plaintiffs to the defendants was a one-half interest in the following-described nursery stock" is sufficient as an allegation that defendants represented that they would convey to plaintiffs a half interest in said nursery stock. Sneve v. Schwartz, 287.
4. An allegation in a complaint for damages for false and fraudulent representations in inducing plaintiffs to enter into a contract to exchange property, "that the plaintiff John S. Sneve relied upon the same by reason of the enfeebled condition of his mind. and that had not the said John S. Sneve been in such an enfeebled mental condition the said contract would not have been made," is sufficient to show that plaintiffs relied upon misrepresentations of the defendants. Sneve v. Schwartz, 287.
5. It is not ground for demurrer that a complaint does not show that defendants knew any more about the value of nursery stock than the plaintiffs, where

FRAUD AND DECEIT—continued.

the complaint alleges that defendants represented themselves to be owners of said stock, and that it was worth $10,000, it being further alleged that defendants did not own the stock, and that it was not worth to exceed $1,000, even though plaintiffs might have learned from inspection of the stock that it was worth only $1,000. Sneve v. Schwartz, 287.

6. An allegation in a suit for damages on the ground of false and fraudulent representations which induced plaintiffs to enter into a contract for the exchange of land, that the plaintiffs relied upon the misrepresentations of the defendants, is not rendered insufficient by a further allegation that one of the plaintiffs was feeble-minded, and would not have made the contract had he not been mentally deficient. Sneve v. Schwartz, 287.

FREIGHT.

Liability of carrier of, see Carriers, 2–5.

FRIGHT.

Of horse by automobile, see Highways.

GROUNDS FOR REVERSAL.

For reversal, see Appeal and Error, 21–26.

In criminal prosecution, see Criminal Law, 21–23.

GUARANTY.

1. It is not necessary, in order for one offering his guaranty effectively to waive by the express terms of the offer his right to notice of acceptance, that the offer express a consideration for the guaranty independent of the proposed guarantee's acceptance of, and performance under, the principal contract. W. T. Rawleigh Medical Co. v. Laursen, 63.

2. The right, at common law and under § 6080, Rev. Codes 1905, of one making an offer of guaranty, to notice that his proposal is accepted and will be acted upon, may be waived by the form of the guaranty or by the manifest intention of the parties, as implied thereby; so that where a proposal of guaranty in terms "waiving acceptance and all notice" is attached to a contract to sell goods, and states that in consideration of the proposed seller's extending credit to the proposed vendee the signers guarantee the faithful performance of the contract by the proposed vendee, actual notice of acceptance written or personally made to the guarantors by the guarantee is not necessary to fix the formers' liability to the latter, where the proposed vendee takes the contract and attached proposal to the proposed guarantors, and it is signed by them and then sent by the proposed vendee to the proposed vendor, whereupon such proposed vendor writes to the

GUARANTY—continued.

proposed vendee accepting the proposed guaranty and furnishes the goods under the contract. W. T. Rawleigh Medical Co. v. Laursen, 63.

3. One who contracts to sell goods need not prove his signature to the contract in order to recover from guarantors upon their attached contract of guaranty, where it is shown that he accepted the original contract and shipped the goods thereunder, and the signatures of the vendee and the guarantors are proven. W. T. Rawleigh Medical Co. v. Laursen, 63.

HARMLESS ERROR. See Appeal and Error, 21–26.
In criminal prosecution, see Criminal Law, 21–23.

HIGHWAYS.

FRIGHTENING HORSES BY AUTOMOBILES.

1. The driver of an automobile cannot be held liable for injuries to the occupant of a horse-drawn vehicle which he is about to meet and pass, unless his negligence is the proximate cause of such injuries. Messer v. Bruening, 599.
2. The driver of an automobile, who is about to meet and pass a horse-driven vehicle, may be negligent in not promptly observing whether or not the horse is frightened, and in continuing on his way until he actually observes this, if, in the exercise of prudence, he should observe the fright and stop the automobile before he does. Messer v. Bruening, 599.
3. No liability of the driver of an automobile for failure to stop his machine when about to meet and pass a horse-driven vehicle can be based upon a statute which requires the driver of an automobile, "when signaled by the driver of any vehicle propelled by horses," to stop the same until the horse-drawn vehicle has passed, where an occupant of the horse-drawn vehicle other than the driver signaled him to stop. Messer v. Bruening, 599.
4. The failure of the driver of a horse-drawn vehicle to give the statutory signal to an automobile which he is about to meet and pass, to stop, does not preclude a recovery by him for injury suffered, in an action based on common-law negligence. Messer v. Bruening, 599.

HOMESTEAD.
Consideration for mortgage on, see Mortgages, 3.

HOMICIDE.
Evidence admissible on prosecution for homicide while committing abortion, see Criminal Law, 7–9.

HOMICIDE—continued.
Evidence in prosecution for, see Criminal Law, 7–9.
Correctness of instruction in prosecution for, see Criminal Law, 11–13.
Cross-examination of witness on prosecution for, see Witnesses, 6.

INTENT.

1. The only criminal intent involved in a criminal trial for murder in procuring an abortion is the intent to procure or bring about a miscarriage which is not necessary to save the life of the woman, and the burden of proving the non-necessity is upon the state. State v. Reilly, 339.
2. One who commits an abortion upon a pregnant woman may be guilty of the crime of murder in the second degree, although he may not have intended at the time of the commission of the act to cause a miscarriage which would result in the death of the woman. State v. Reilly, 339.

INDICTMENT.

3. An information for the unintentional killing of a human being while engaged in the commission of a felony, the procurement of an abortion which is otherwise in ordinary, concise language, and easily understood by a person of common understanding, as required by § 8912, Rev. Codes 1905, is not rendered vulnerable to demurrer because it states that the defendant used an instrument with the intent to produce and procure the "miscarriage" of a specified person, the "same" not being then and there necessary to preserve the life of such person, as the word "same" clearly referred to the word "miscarriage." State v. Reilly, 339.

HORSES.
Frightening of, by automobiles, see Highways.

HUSBAND AND WIFE.
Time for married woman to claim exemptions, see Exemptions.

HYPOTHETICAL QUESTION.
Sufficiency of objection to, see Criminal Law, 18.

ILLEGAL VOTES.
Effect of casting, see Elections, 2.

INADEQUACY OF PRICE.
As ground for setting aside foreclosure sale, see Mortgages, 16.

INDEBTEDNESS.
Presumption of continuance of, see Evidence, 3.
City election to increase limitation of, see Municipal Corporations, 6–18.

INDEPENDENT CONTRACTOR.
Employer's liability for injury due to negligence of, see Master and Servant, 6–8.

INDICTMENT AND INFORMATION.
Time to demur to, see Criminal Law, 1–3.
For killing human being while procuring abortion, see Homicide, 3.

INFORMATION.
Time to demur to, see Criminal Law, 1–3.

INFORMATION AND BELIEF.
Sufficiency of allegation of, see Exchange of Property, 2.

INJUNCTION.
Proper party to bring, see Parties, 2.

1. A citizen and taxpayer may maintain an action in the name of the state, when the attorney general refused to do so, to enjoin the commissioners of public printing from proceeding under a state printing contract, under which it is claimed work is being done contrary to the statute, and to have said contract canceled. State ex rel. Miller v. Hall, 85.
2. Resort cannot be had to a court of equity to restrain the collection of a personal tax on national bank stock, alleged to be illegal in part by reason of an intentional over assessment and unequal assessment, where the taxpayer has neglected to avail himself of the statutory remedies especially provided for such an abuse of authority on the part of the taxing officials. First Nat. Bank v. Steenson, 629.

INSTRUCTION.
Prejudicial error in giving, see Appeal and Error, 26; Criminal Law, 22, 23.
See Trial, 2, 3.

INTENT.
Of person committing homicide, see Homicide, 1, 2.

INTEREST.
Right to, in excess of penalty of bond, see Damages, 1.

1. No notice to the surety of the breach, or demand to make it good, having been shown, interest on a recovery upon an official bond is allowable only from the date the action was commenced. Dickinson v. White, 523.
2. Seven per cent interest is properly allowed on a recovery by a city upon the official bond of its treasurer, the rate of interest not being limited to three per cent, the amount received by the city on its funds, and the highest rate provided by law for deposits by cities. Dickinson v. White, 523.

INTERVENTION.
Liability for costs, see Costs, 2, 3.

INTOXICATING LIQUORS.
Nature of action to recover payments made for purchase of intoxicating liquor sold in violation of prohibition law, see Judgment, 4.
Sufficiency of title of statute relating to, see Statutes, 1.

One who is merely in the control of a building has a sufficient proprietary interest therein to commit the crime of knowingly permitting, otherwise than by leasing, it to be used for the purpose of unlawfully dealing in intoxicating liquors, covered by chapter 193 of the Session Laws of 1907, making guilty of a misdemeanor every owner, agent, "or other person" who lets any building, knowing it is to be so used, or who "otherwise permits" any building to be so used. State v. McGillic, 27.

JUDGES.
Justice of the peace, see Justice of the Peace.

JUDGMENT.

Questions considered on appeal from order relieving from default, see Appeal and Error, 15.

Making attorney's lien effective by entering in judgment docket, see Attorney and Client, 3; Bankruptcy, 3.

Equitable assignment of, to attorney holding lien, see Bankruptcy, 3.

By Default.

Before justice of the peace, see Justice of the Peace, 1.

1. A judgment may, under N. D. Codes 1905, § 7001, subd. 1, be entered by default without notice to defendant of assessment of damages, in an action arising on contract for the recovery of money, notwithstanding the entry of a general appearance by him. Naderhoff v. Geo. Benz & Sons, 165.
2. The amount for which judgment may be entered in an action under N. D. Rev. Codes 1905, § 9390, for the recovery of amounts paid for intoxicating liquor sold in violation of the prohibition law, is not admitted by failure to answer, under § 7001, subd. 1, authorizing judgment by default without assessment of damages in an action arising on contract "for the recovery of money only," as such statute contemplates proof in all cases except where the contract by its terms makes proof of the amount of such, as a promissory note or similar contract establishes the specific amount of liability. Naderhoff v. Geo. Benz & Sons, 165.
3. Pendency of a motion by defendant to require security for costs from a nonresident plaintiff, which is undisposed of at the expiration of the thirty days allowed by N. D. Codes 1905, § 6853, for answering or demurring, does not of itself extend the time allowed for answering or demurring, as the right to such security ceases on the expiration of the time to answer, without answer or demurrer. Naderhoff v. Geo. Benz & Sons, 165.
4. An action to recover payments made by plaintiff for the purchase of intoxicating liquor sold in violation of the prohibition law, brought under N. D. Rev. Codes 1905, § 9390, which provides that such payments shall be held to have been received in violation of law and "upon a valid promise and agreement of the receiver, in consideration of the receipt thereof, to pay on demand to the person furnishing such consideration the amount of said money," is an action upon a "contract," but not one "for the recovery of money only," within the meaning of § 7001, so as to authorize the entry of a judgment by default without the assessment of damages on defendant's failure to answer or demur. Naderhoff v. Geo. Benz & Sons, 165.

Setting aside; abuse of discretion in imposing terms, see Appeal and Error, 18.

JUDGMENT—continued.

OPENING OR SETTING ASIDE DEFAULT.

Questions on appeal, see Appeal and Error, 16.

5. A judgment by default may be vacated without an affidavit of merits, where judgment was erroneously entered on default without an assessment of damages or notice to defendant, in a case where such assessment and notice were required. Naderhoff v. Geo. Benz & Sons, 165.

6. An affidavit of merit by defendant's attorney, reciting that affiant received a copy of the pleadings served on defendant, together with information to make an answer, and from such information informed defendant that he had a good and meritorious defense, and now states the same to the court as further shown by the answer referred to and made a part of the affidavit, is insufficient to invoke the court's discretion under N. D. Rev. Codes 1905, § 6884, to vacate a regularly entered judgment of default on the ground of excusable neglect, where such affidavit fails to state that affiant has been fully and fairly informed of all the facts in the case, and believes therefrom that defendant has a meritorious defense, and no facts are recited concerning the defense except in the proposed answer, which is verified by the attorney on information and belief. Naderhoff v. Geo. Benz & Sons, 165.

7. A court in relieving one of a default judgment under N. D. Rev. Codes 1905 § 6884, giving the court in such case the right to impose in its discretion "such terms as may be just," cannot impose as a term upon the party relieved the traveling expenses of the other to and from a distant country on a business trip, where he went just prior to the term at which the case was to be tried, and in order to be at the trial, returned, leaving the business unfinished. North Dakota Co. v. Mix, 81.

8. The purpose of allowing terms in giving the relief covered by the provision of N. D. Rev. Codes 1905, § 6884, authorizing a court in "its discretion and upon such terms as may be just" within a year after notice thereof to relieve a party from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect, is not to penalize that party, but to reimburse the other party for damages occasioned by the delay; and a trial court, on giving such relief, should not impose upon the relieved party terms in the nature of a penalty. North Dakota Co. v. Mix, 81.

9. Although one who has obtained a judgment by default may, upon the other party's being relieved thereof under N. D. Rev. Codes 1905, § 6884, be entitled as a term upon which the relief is granted to have such other party pay him the difference between what he would have had to pay his attorney for a single trial and what he will have to pay him for two trials, he is not entitled to receive a sum as such upon affidavit that he has agreed

JUDGMENT—continued.

to pay his attorney that sum "for attorneys' fees for his services in obtaining judgment in" his "favor in said action," "that if said action is tried again" he "must pay another attorneys' fee" for trying it, and that if the judgment is vacated he will be damaged in that sum, attorneys' fees,—since under the wording of such affidavit it is impossible to say how much difference he will have to pay his attorney on account of the postponement. North Dakota Co. v. Mix, 81.

10. Additional time to answer will be given, on vacating a judgment improperly entered by default without assessment of damages or notice to defendant in a case where such assessment and notice were required, where the failure to answer was due to the inadvertence and mistake of defendant's attorney. Naderhoff v. Geo. Benz & Sons, 165.

JUDGMENT NOTWITHSTANDING VERDICT.

Appealability of order denying motion for, see Appeal and Error, 1, 2.

11. The supreme court, in a proper case, has the power, on appeal, to order judgment *non obstante veredicto*, under N. D. Rev. Codes 1905, § 7044, although no motion was made in the lower court for judgment notwithstanding the verdict, or for a new trial. Houston v. Minneapolis, St. P. & S. Ste. M. R. Co. 469.

COLLATERAL ATTACK.

12. A court, on collateral attack of its judgment or decree, will be presumed to have done its duty, and this includes the presumption that all parties affected were properly before it. Shane v. Peoples, 188.

13. The jurisdiction of a county court to administer an estate is conferred by the petition in the proceedings, and if it is on its face regular, and a judgment is entered or a decree rendered in conformity therewith, jurisdiction will be presumed on collateral attack. Shane v. Peoples, 188.

14. Where a petition is filed in a county court in administration proceedings by an heir-at-law, which states that he is the sole and only heir-at-law, there is, upon a collateral attack upon such proceedings by one who claims to have been an heir, and not to have been made a party to or cited to appear in such proceedings, a legal presumption that the county court passed upon the question of heirship. Shane v. Peoples, 188.

15. To subject the judgment of a county court to collateral attack the absence of jurisdiction must appear on the face of the judgment, and though the record may be irregular and defective, the judgment, if valid upon its face, is not as a rule subject to collateral attack; and it is not sufficient to overcome the presumption in favor of the jurisdiction of the court for the per-

JUDGMENT—continued.

son seeking collaterally to avoid its consequences merely to allege that he had no legal notice of the pendency of the action, but he must allege what, if anything, was shown by the record in relation to the issue and service of process. Shane v. Peoples, 188.

16. In a collateral attack upon a judgment of a county court and sale thereunder, it is not sufficient to allege that the party seeking to avoid it was not served with notice or made a party thereto; the allegation should be that there was not in fact such notice, and that the record of the judgment did not show such fact. Shane v. Peoples, 188.

17. The rules regarding the conclusiveness of, and presumptions in favor of, a judgment of the county court in administration proceedings authorizing and ratifying the sale by the administrator of land belonging to the estate, when such judgment is attacked collaterally to avoid the sale, apply with full force even where the one so attacking alleges fraud in the presenting of the petition in the administration proceedings, where he does not allege and prove that the purchaser at such sale was a party to the fraud. Shane v. Peoples, 188.

CONCLUSIVENESS OF ADJUDICATION.

18. Separate actions to quiet title by two grantees of the same grantor, in the name of the grantor, against the same defendant, are between different parties, so that the decision of one is not a bar to the bringing of the other. Randall v. Johnstone, 284.

PAYMENT, SATISFACTION AND DISCHARGE.

19. A judgment for plaintiff in an action on a bond substituted in lieu of an attorneys' lien will be satisfied of record where the amount of such lien has been collected by an execution sale under a judgment sustaining such lien. Murphy v. Casselman, 51.

JUDGMENT ROLL.

Mandamus to compel making of additional certificate to, on appeal, see Mandamus.

JUDICIAL NOTICE. See Evidence, 1.

JUDICIAL SALE.

Sale of land by administrator, see Executors and Administrators; Judgment, 17.

Satisfying judgment of record, where amount has been otherwise collected, see Judgment, 19.

JURISDICTION.

Original jurisdiction of supreme court, see Courts.

Presumption of, when judgment is collaterally attacked, see Judgment, 12–15.

JURY.

1. When a jury panel has been properly summoned, but some of the members thereof fail to appear at the trial, it is not necessary that the impaneling of the jury be delayed or that the trial be postponed, nor is it necessary that the court summon other jurors to fill the places of the absent members, or issue attachments for them. State v. Reilly, 339.
2. A trial judge has no right to arbitrarily discharge the regular jury panel without cause, and summon another for the trial of a particular cause, but he may, for reasons of his own, and in the exercise of his discretion, excuse jurors who have been summoned, although it may thus be necessary to call talesmen or an additional jury, and regardless of whether or not his reasons constitute legal grounds for disqualification or exemption, especially where there is no proof or suggestion of partiality on the part of the court or of any real prejudice to the defendant. State v. Reilly, 339.

JUSTICE OF THE PEACE.

Prohibition against, see Prohibition.

1. An order, entered without grounds, vacating a default judgment, but retaining the case for trial *de novo*, should be set aside and the judgment reinstated as the final judgment in the case, it having been rendered upon findings and after proof taken. Stacy Fruit Co. v. McClellan, 449.

CHANGE OF VENUE.

2. The filing of an affidavit of prejudice, and motion for change of venue, and the payment of the requisite fee, under N. D. Rev. Codes 1905, §§ 8375, 8377, supersede and stay all further powers of a justice court, and render the justice powerless to proceed with the merits of the cause and to do other than the ministerial act of entering an order transferring the cause to another justice for trial. Stacy Fruit Co. v. McClellan, 449.
3. The filing of an affidavit of prejudice, and demand for change of venue, and the payment of the requisite fee under N. D. Rev. Codes 1905, §§ 8375, 8377, do not devest a justice of the peace of jurisdiction of the subject-matter or of the person, so as to render an appeal to the district court on the law and facts, with a demand for trial *de novo*, from a judgment

JUSTICE OF THE PEACE—continued.

by the justice in excess of his jurisdiction because rendered after his erroneous refusal to transfer the cause to another justice, abortive and void as not transferring jurisdiction of the subject-matter to the district court. Stacy Fruit Co. v. McClellan, 449.

4. The payment of $1 and the presentation of an affidavit of prejudice, and demand for change of venue, is all that is required by N. D. Rev. Codes 1905, §§ 8375, 8377; and the justice cannot exact an additional 10 cent filing fee as a condition of granting a change of venue, since for all purposes the affidavit and application must be considered as filed in the justice court after presentation. Stacy Fruit Co. v. McClellan, 449.

LEASE.

Of printing plant for purpose of doing public printing, validity, see States, 1.

LETTERS.

Admissibility of, in evidence, see Evidence, 9, 10.

LIENS.

Of attorney, see Attorney and Client, 3; Bankruptcy, 3.

Equitable assignment of judgment to attorney holding lien, see Bankruptcy, 3.

Of attorney, see Judgment, 19.

Of attachment; effect of bankruptcy proceedings to avoid, see Bankruptcy, 1.

LIFE TABLES.

Judicial notice of, see Evidence, 1.

Admissibility in evidence, see Evidence, 19.

LIMITATION OF ACTIONS.

Under N. D. Rev. Codes 1905, § 6770, the running of the statute of limitations cannot be raised by demurrer, but must be pleaded in the answer, even though the fact is apparent from the face of the complaint. Shane v. Peoples, 188.

LIMITATION OF INDEBTEDNESS.

Of city, election to increase, see Municipal Corporations, 6–18.

LIQUORS.
Intoxicating liquors, see Intoxicating Liquors.

LOAN.
By national bank, see Banks and Banking, 1.

LOOKOUT.
At highway crossing, see Railroads, 1.

MANDAMUS.
Original jurisdiction of supreme court to grant, see Courts.

An alternative writ of mandamus issued to compel a district judge to settle a statement of the case proposed by the plaintiff, and to create or make an additional certificate to the judgment roll on appeal, or to show cause, will be dismissed upon a hearing upon the merits, where it appears that the statutory limit, thirty days from the service of notice of judgment as prescribed by the Code, § 7058, had expired before the filing of the application for the writ, and it does not appear that the judge had, at any time, upon proper request, refused to certify to the record on appeal. Cedar Rapids Nat. Bank v. Coffey, 457.

MASTER AND SERVANT.
Carrier's liability for arrest of passenger, by conductor, see Carriers, 1.

PROXIMATE CAUSE OF INJURY.

1. Looseness in the mechanism of an air press used to force bushings through holes in locomotive links, in a railroad shop, is not the proximate cause of an injury, where a machinist inaccurately struck blockings placed over the bushing, while the pressure was on, in order to force the bushing through, and the blockings gave way, causing the link to drop on the helper's foot, the machine having worked perfectly before. Ness v. Great Northern R. Co. 572.

RISKS ASSUMED BY SERVANT.

2. A master is not liable for an injury to a machinist's helper from the use of alleged unsuitable and defective press blocking irons, where both the machinist and the helper knew, or must have known, from their daily

MASTER AND SERVANT—continued.

use thereof, as much about the condition of the irons as the master, and there were plenty of suitable irons near at hand and at their disposal. Ness v. Great Northern R. Co. 572.

3. Where an employee injured while working as a machinist's helper in a railroad machine shop, at an air press used to force bushings into holes in locomotive links, admitted, as did also the machinist, that there were no defects, to their knowledge, either in the machinery or in appliances used, and it appeared that the blockings had been used satisfactorily for a long time, and both the employees knew, or should have known, as much about their condition as the master, and more suitable blockings were available, no recovery can be had on the ground of negligence in furnishing defective and unsuitable blockings, even though the blockings used were not the most suitable for the purpose. Ness v. Great Northern R. Co. 572.

QUESTIONS FOR JURY AS TO MASTER'S LIABILITY TO INJURED SERVANT.

4. The evidence is insufficient for submission to the jury in an action by an employee who was injured while working as a machinist's helper in a railroad shop, on the issue of negligence in furnishing a defective air press and unsuitable and defective blocking irons, where it is shown that while working at the air press, which was being used to press a bushing into a hole in a locomotive link, the machinist inaccurately struck the blocking irons placed upon the bushing, in order to force the bushing through, and the blocks gave way, causing the link to fall on the helper's foot, the blocks being sufficient to sustain the pressure of the piston of the air press, and the only alleged defect in the air press being that it was loose when the pressure was not on, and it would have held firm and the blocks would not have given away but for the striking of the blow, and it further appeared that there were more suitable blocking irons which could have been utilized. Ness v. Great Northern R. Co. 572.

5. In an action for injuries to a machinist's helper while assisting in pressing a bushing into a link by means of an air press, the blocking giving way when struck a slanting blow with a sledge by the machinist, because the bushing stuck, resulting in the link falling from the press table onto the helper's foot, the evidence is insufficient to authorize the submission to the jury of the question of the master's negligence in furnishing a defective press, or in furnishing unsuitable and defective blocking irons for its safe operation, where it appears that the press and irons had been in use a long time before and after the accident; that, though there was a slight play or looseness at the points where the press was fastened to the table, no play can exist when the pressure, which was on at the time of the

MASTER AND SERVANT—continued.

accident, is applied; that the machinist considered the irons satisfactory, and, though their flanges were partly broken off, that did not render them unfit for use; that the machinist and the helper knew, or should have known, as much about their condition as the master; and that there were plenty of irons near at hand suitable for blockings, which they could select; and they both admitted that there were no defects in the press or appliances. Ness v. Great Northern R. Co. 572.

LIABILITIES FOR INJURIES TO THIRD PERSONS.

6. A person contracting to haul or run a threshing machine to a named place, before a certain date, for a specified sum, and to furnish all help, fuel, and water, the owner to furnish any needed repairs, is an independent contractor. Taute v. J. I. Case Threshing Mach. Co. 102.
7. An owner of property is liable in damages, although the work is intrusted to an independent contractor, where the work ordered to be done, or the structure ordered to be erected, is, in itself, intrinsically dangerous or a nuisance. Taute v. J. I. Case Threshing Mach. Co. 102.
8. The moving by an independent contractor of a threshing engine with a crack in the door of the fire box is not so intrinsically dangerous a transaction as to render the owner liable for damages from a fire seen to start near the highway after the engine passed, where the evidence shows that the crack in the door was plastered with mud, and there is no evidence that the crack had anything to do with the fire. Taute v. J. I. Case Threshing Mach. Co. 102.

MOOT QUESTION. See Appeal and Error, 16.

MORTALITY TABLES.

Judicial notice of, see Evidence, 1.

Admissibility in evidence, see Evidence, 19.

MORTGAGES.

Costs on foreclosure of, see Costs, 2, 3.

VALIDITY; LACK OF CONSIDERATION.

1. The proof of fraud or duress to justify the cancelation, upon such ground, of a mortgage valid and regular upon its face, must be clear and convincing. Englert v. Dale, 587.
2. Threat of the lawful arrest of her son for an offense which he has actually

MORTGAGES—continued.

committed will not in itself justify the setting aside, on the ground of duress, of a mortgage executed by his mother as a result of such threat, and to secure the maker of the threat for the loss occasioned to him by the commission of such crime. Englert v. Dale, 587.

3. In an action by the mortgagor to set aside a mortgage, valid and regular upon its face, upon the ground of a failure of consideration in that the release which was the consideration was not delivered prior to notice to the mortgagee of the repudiation of the mortgage by the mortgagor, the burden is upon the plaintiff to show that the release was not so delivered. Englert v. Dale, 587.

4. U. S. Rev. Stat. § 2296 (U. S. Comp. Stat. 1901, p. 1398), providing that no lands acquired under the homestead act shall become liable for debts contracted prior to the issuance of the patent therefor, does not contemplate a restriction upon the homesteader's power voluntarily to mortgage his interest therein; and a release of such a mortgage is a valid consideration for the execution by his mother of a mortgage upon her land. Englert v. Dale, 587.

FORECLOSURE BY EXERCISE OF POWER OF SALE.

5. It is not necessary, in order to constitute a valid foreclosure sale under a power, by virtue of N. D. Rev. Codes 1905, § 7462, which provides that if mortgaged premises consist of distinct farms, tracts, or lots they must be sold separately, that only a portion of a farm of 160 acres be sold to satisfy a second mortgage, the debt being small,—especially where 40-acre tracts were first offered, then 80-acre tracts, and, there being no bidders, then the entire farm. Bailey v. Hendrickson, 500.

BIDS AND BIDDERS.

See also infra, 16.

6. It is not necessary that there be more than one bidder at a foreclosure sale by advertisement, provided the public has been fully advised of the sale by legal publication of the notice, and has the right and opportunity to attend and bid. Bailey v. Hendrickson, 500.

7. A letter written by attorneys for the mortgagee to the sheriff, asking him that the sale be set for a certain date, and stating that they had written the newspaper in which the sale had been advertised to forward the affidavit of publication and bill for printing to the sheriff, and authorizing him to bid in the property for the amount due, must be considered as a bid authorizing the sheriff to strike off the property to the mortgagee, if no one bid a greater sum. Bailey v. Hendrickson, 500.

MORTGAGES—continued.

NOTICE OF SALE.

8. The mortgagor, upon foreclosure by advertisement under a power, is charged with knowledge of the foreclosure proceedings, where the notice is published in a duly qualified newspaper in the county where the land is situated; and the mere fact that he had no actual notice thereof is not, under ordinary circumstances, evidence of fraud or bad faith; and the notice has the same binding force that a foreclosure by action has when the defendants therein are personally served with process. Bailey v. Hendrickson, 500.

9. The fact that the notice of sale under foreclosure of a second mortgage under a power was not signed in the name of the assignee of the mortgage does not render the sale invalid, where the notice was signed by the sheriff and by a firm of attorneys as attorneys for the assignee, and the body of the notice disclosed the name of the assignee, the date of record of the assignment, and the book and page where recorded, as the notice presumably shows a power of attorney to the attorneys to foreclose the mortgage: and it will be presumed that this power of attorney was recorded as required by statute, in absence of evidence to the contrary, and as there is no statutory requirement that the name of the assignee of the mortgage be appended to the notice of sale. Bailey v. Hendrickson, 500.

PUBLICATION OF NOTICE OF SALE.

10. Six publications in six successive weeks, the last publication being the day before the sale, in a foreclosure under order of sale contained in the mortgage, fulfils the requirements of N. D. Rev. Codes 1905, § 7459, which requires that notice be given by publication six times, once in each week for six successive weeks. Bailey v. Hendrickson, 500.

11. The qualifications of a newspaper for publishing legal notices are prescribed by N. D. Rev. Codes 1905, § 2279, and it is not for the court, in the absence of fraud, to go back of the legislative judgment, and set aside a foreclosure sale by advertisement under a power, where the notice was published in a newspaper qualified under said section, because it may not have had as large a circulation in the vicinity where the land was located as some other newspaper in the county. Bailey v. Hendrickson, 500.

VALIDITY; SETTING ASIDE SALE.

12. The mere fact that the holder of a second mortgage by assignment did not place the assignment of record until about fifteen months after obtaining it, but did record it a few days before the institution of foreclosure proceedings by advertisement under a power, does not show fraud, where it

MORTGAGES—continued.

appears that the mortgagor never examined the records nor inquired of the original mortgagee as to whether the mortgage was due, and never attempted to pay it, but proceeded in total disregard of the mortgage, and was in no way prejudiced by the failure to record the assignment promptly. Bailey v. Hendrickson, 500.

13. Where a second mortgagee has fully complied with the requirements of the statute regarding foreclosure under a power, the mere fact that some of the acts might have been done for the purpose of preventing the mortgagor from acquiring knowledge of the foreclosure proceedings is not an indication of bad faith upon the part of the mortgagee, in the absence of proof of an intent to conceal the foreclosure, or of knowledge by the mortgagee that the mortgagor did not have actual knowledge of the proceedings. Bailey v. Hendrickson, 500.

14. The mere fact that the second mortgagee did not collect the rent due from the tenant during the year of redemption, although he was entitled thereto, and that the same was paid by the tenant to the mortgagor and retained by him, is not evidence of bad faith or fraud upon the part of the second mortgagee in the conduct of the foreclosure proceedings, in the absence of proof that he knew that the mortgaged premises were cultivated or rented. Bailey v. Hendrickson, 500.

15. The fact that a mortgagor paid interest on the first mortgage after the institution of the foreclosure proceedings under a power, and that the second mortgagee did not ascertain that fact and prevent his doing so, or that he paid taxes on the premises, is no badge of fraud, and does not show lack of good faith, or constitute a ground for vacating the sale under the second mortgage, where there is no showing that the second mortgagee knew of any such act, as, even if he had known of it, he had a right to assume that the mortgagor, with full knowledge of the second mortgage, was intending to pay or redeem from it. Bailey v. Hendrickson, 500.

16. The rule that mere inadequacy of price is not a ground on which to set aside a foreclosure sale, in the absence of fraud, undue advantage, or prejudice, is especially applicable where the second mortgagee of land under a foreclosure of the second mortgage by advertisement bids the amount of the mortgage and costs, although he is the only bidder, as to require him to pay more than the amount due might result in great injustice and render his security valuleless. Bailey v. Hendrickson, 500.

REDEMPTION.

Liberal construction of statute as to, see Statutes, 2.

17. Under N. D. Rev. Codes 1905, §§ 7140, 7141, and 7165, the holder of a mortgage subsequent in priority to that from which he desires to redeem cannot

MORTGAGES—continued.

be compelled to pay the purchaser at the foreclosure sale, in addition to the purchase price of his mortgage, with interest, the amount of a mortgage lien which is prior to the one which was foreclosed. Leverson v. Olson, 624.

MOTIONS.

Initiating proceedings to obtain writ of prohibition by order to show cause, see Prohibition.

MUNICIPAL BONDS. See Municipal Corporations, 6–18.

MUNICIPAL CORPORATIONS.

Conclusiveness of admissions by city treasurer on sureties on his bond, see Evidence, 12–14.

LIABILITY ON OFFICIAL BONDS.

Right of bank to charge off account of city treasurer fraudulent county warrant deposited by him, see Banks and Banking, 3.

1. A shortage in an officer's accounts, shown to exist during a certain term of his office, will not be presumed to have arisen on account of defalcations occurring during that term, where it appears or is probable that shortages shown to have arisen during previous terms may have been included. Dickinson v. White, 523.
2. Receipts given by a city treasurer to a county treasurer for sums paid by the latter to the former as the proceeds of taxes collected and belonging to the city, and official reports made by the former to the mayor and city council, wherein lesser amounts were reported, make a prima facie case for the city, as against both its treasurer and his surety, of alleged shortages in his accounts. Dickinson v. White, 523.
3. Alleged shortages are properly shown, in an action by a city upon the official bond of its treasurer, by the introduction in evidence of receipts given by him to the county treasurer for sums paid by the latter to the former as the proceeds of taxes collected and belonging to the city, followed by official reports made by its treasurer to the mayor and city council, wherein lesser amounts were reported. Dickinson v. White, 523.
4. A finding, in an action by a city upon the official bond of its treasurer, that he was short in a specified sum, is sustained by evidence consisting of a receipt given by him to the county treasurer for the amount paid by the latter to the former as the proceeds collected and belonging to the city,

MUNICIPAL CORPORATIONS—continued.

and of an official report made by its treasurer to the mayor and city council, wherein a lesser amount was reported, and the testimony of the city treasurer, corroborated by other witnesses, that the difference in the amounts received and reported as having been received has never been made up by him. Dickinson v. White, 523.

5. The deposit by a city treasurer to cover up a shortage in his account of a fraudulent county warrant to his credit as such treasurer the bank, charging such credit off its books, on discovering its fraudulent character, does not operate to liquidate the shortage so as to exonerate the treasurer's surety. Dickinson v. White, 523.

SUBMISSION OF QUESTION OF ISSUE OF BONDS TO POPULAR VOTE.

6. A special city election to increase the debt limit and issue bonds for a light plant may be authorized by the city council either by resolution or ordinance. Kerlin v. Devils Lake, 207.

7. The fact that the resolution of the council and the notice, as to a special city election to issue bonds, specify the amount of the bonds, does not render the insufficient statement in the ballot of the amount as not to exceed the amount specified in the resolution and notice, a mere irregularity, but such defect in the ballot invalidates the election. Kerlin v. Devils Lake, 207.

8. It is not necessary to the validity of the notice of a special city election to increase the debt limit and issue bonds that it be published in the official newspaper of the city, under N. D. Rev. Codes 1905, § 2678, providing for notice in a newspaper published in the city. Kerlin v. Devils Lake, 207.

9. A newspaper is legally designated as the official city paper at a meeting held in October instead of May, under N. D. Rev. Codes 1905, § 2677, providing for such designation by the council at its first meeting in May, or as soon thereafter as practicable. Kerlin v. Devils Lake, 207.

10. General statutory registration requirements do not apply to a special city election held to increase the debt limit and issue bonds for a light plant, but the details of registration are to be provided for by municipal ordinance. Kerlin v. Devils Lake, 207.

11. Want of registration at a special city election to increase the debt limit and issue bonds for a light plant does not invalidate the election, in the absence of fraud or of illegal voting sufficient to change the result. Kerlin v. Devils Lake, 207.

12. An allegation that certain named persons illegally voted, without charging that it changed the result of the election, and which is insufficient to impute fraud in the conduct thereof, does not charge facts sufficient to invalidate the election. Kerlin v. Devils Lake, 207.

13. A special city election will be upheld, in the absence of a statute expressly

MUNICIPAL CORPORATIONS—continued.

invalidating it, where it is held as called for, at the place designated by the lawful municipal authority, and is regularly conducted and a fair and regular canvass and return made of all votes cast, with no fraud charged. Kerlin v. Devils Lake, 207.

14. The ballot, in a special city election, stating the amount of the proposed bond issue as not to exceed a specified amount, is too indefinite. Kerlin v. Devils Lake, 207.

15 A dual question of increase in debt limit and of bonding after such increase, both for a city light plant, may be submitted upon the ballot at one election, if the form of the ballot permits the question to be voted upon separately. Kerlin v. Devils Lake, 207.

16. The fact that both of the questions of increase in debt limit and bonding after such increase, to be voted upon at a special city election, are, under the form of the ballot, submitted jointly instead of separately, does not prejudice or mislead the voter as to the question of increasing the debt limit. Kerlin v. Devils Lake, 207.

17. The invalidity, as to the issuance of bonds, of a special city election upon the two questions, jointly submitted, of increasing the debt limit and of issuing bonds for a light plant, does not render it invalid in so far as it authorizes an increase of the debt limit for such purpose. Kerlin v. Devils Lake, 207.

18. A special city election to increase the debt limit and issue bonds for a light plant, held at one central voting place, instead of having a place for voting in each ward as an election precinct as required by statute, is irregular, but not void, where the place of election was where city special elections for years had usually been held, a large vote was polled for a special election, ample opportunity was afforded all electors to vote, and there was no fraud in the calling of, or in the conduct of, the election. Kerlin v. Devils Lake, 207.

NAME.

Applied to contract, materiality of, see Contracts, 1.

NATIONAL BANKS.

Validity of loan by, see Banks and Banking, 1.
Personal tax on, see Injunction, 2; Taxes, 1.
Right to restrain distress to pay over assessment, see Parties, 2.
Tax on stock of, see Taxation, 1, 2.

NEGLIGENCE.

In frightening of horse by automobile, see Highways.

NEGLIGENCE—continued.
Of master, see Master and Servant.
Of railroad company, see Railroads.
Correctness of instruction as to, see Trial, 3.

FIRES.

One who dumps from the fire box of a traction engine being transported along a public road, live coals in close proximity to dry prairie grass, upon a windy day, may be held to the exercise of "good judgment and sound common sense" in extinguishing such live coals in order to prevent the firing of wheat stacks in the vicinity. Huffman v. Bosworth, 22.

NEWLY DISCOVERED EVIDENCE.
As ground for new trial, see Criminal Law, 14.

NEWSPAPER.
For publishing notice of sale under power in mortgage, see Mortgages, 11.
Official newspaper for city, see Municipal Corporations, 8, 9.

NEW TRIAL.
In criminal prosecution, see Criminal Law, 14, 15.

NOMINAL PLAINTIFF.
Rights of, in action to quiet title, see Quieting Title, 1–3.

NON OBSTANTE VEREDICTO.
Appealability of order denying motion for judgment notwithstanding verdict, see Appeal and Error, 1, 2.
Judgment notwithstanding verdict, see Judgment, 11.

NOTICE.
Of appeal, see Appeal and Error, 6, 7.
Of attorney's lien, see Attorney and Client, 3; Bankruptcy, 3.
To bank that money paid it by county treasurer belonged to county, see Banks and Banking, 2.
Of election to rescind contract, see Contracts, 2.

NOTICE—continued.
Necessity of, to start interest running, see Interest, 1.
Of sale under power in mortgage, see Mortgages, 8–11.
Of special city election to increase debt limit and issue bonds, see Municipal Corporations, 8.
In initiating proceedings to obtain writ of prohibition by notice to show cause, see Prohibition, 1–3.

OATH.
To accusation in disbarment proceedings, see Attorney and Client, 1, 2.

OBJECTIONS.
To saving questions for review, see Appeal and Error, 4, 5.
To present question for review on appeal, see Criminal Law, 17–19.
To depositions, see Depositions, 1.

OCCUPATION.
Right to allowance for, in action to quiet title, see Quieting Title, 2, 3.

OFFICERS.
Right of bank to charge off account of city treasurer fraudulent county warrant deposited by him, see Banks and Banking, 3.
Conclusiveness of admission by, against sureties on bond of, see Evidence, 12–14.
Interest on bonds of, after breach, see Interest.
Appropriation for salary of tax commissioners, see States, 3–7.
State board of tax commissioners, see Taxation, 3–5.

1. A *de jure* officer can recover from the *de facto* officer the salary or fees received by him during his incumbency. Lauder v. Heley, 274.

LIABILITY ON OFFICIAL BONDS.

Municipal officers, see Municipal Corporations, 1–5.

2. An allegation, in an action to recover county funds alleged to have been

OFFICERS—continued.

paid to a bank by the defaulting treasurer of the county, that the payments were made by checks signed in the name of the county, issued and delivered by the county treasurer and received by the bank in payment of the individual debt of the treasurer, with the knowledge of the bank, is sufficient allegation that the payments were unlawfully made. Northern Trust Co. v. First Nat. Bank, 74.

3. A complaint in an action by a bonding company against a bank to recover funds claimed to have belonged to a county and to have been received unlawfully by the defendant from the county treasurer, whose default is alleged to have been made good by plaintiff as surety of the treasurer on his official bond by payment of a judgment in favor of the county, alleging that in 1911 the treasurer was some $7,000 short in his accounts, that between a date in 1907 and a date in 1909 the treasurer, in payment of his personal indebtedness, issued checks signed in the name of the county, and delivered them to the defendant to the amount of some $2,500; that they knew or ought to have known that the funds drawn upon were moneys of the county, and not personal funds of the treasurer; that the defendant collected and retained the amount, the said sum being a part of the amount for which the judgment was recovered by the county,—will be deemed sufficiently, although crudely, to plead a shortage in the treasurer's accounts, at the time of the alleged drawing of the checks, when attacked by demurrer upon the ground that the judgment obtained by the county against surety could not be binding upon the bank; and those parts of the complaint to the effect that the treasurer was short in his accounts will be deemed pleaded to show plaintiff's right to be subrogated to the rights of the county, and the defendant will not be estopped to have the question of the shortage litigated independently of the judgment; and for similar reasons the complaint will withstand attack by demurrer upon the ground that it does not show that the alleged shortage was occasioned by the alleged payments of county money to the defendant. Northern Trust Co. v. First Nat. Bank, 74.

OFFICIAL BONDS.

Liability on, see Municipal Corporations, 1–5; Officers, 2, 3.

OFFICIAL NEWSPAPER.

For publication of city notice, see Municipal Corporations, 8, 9.

OPINION EVIDENCE.

In criminal prosecution, see Criminal Law, 4, 5.

See Evidence, 20–25.

ORDER TO SHOW CAUSE.
Initiating proceedings to obtain writ of prohibition by, see Prohibition.

ORDINANCE.
Authorizing city election to increase debt limit by, see Municipal Corporations, 6.

ORIGINAL JURISDICTION.
Of supreme court, see Courts.

PARTIES.
Liability of intervener in foreclosure suit for costs, see Costs, 2, 3.
Right of taxpayer to bring injunction suit, see Injunction, 1.
In proceeding for prohibition against justice of the peace exceeding jurisdiction, see Prohibition, 2.

1. The use plaintiff is the real party in interest, in an action in the name of his grantor to quiet title to land deeded while the grantor was out of possession. Randall v. Johnstone, 284.
2. An action in equity will not lie in behalf of a national bank whose shares of stock have been, by the concurrent action of the taxing officers, illegally and purposely over assessed and unequally assessed against the individual owners of such shares, to restrain the county treasurer from distraining the goods of such owners and selling them in satisfaction of such taxes, as under N. D. Laws 1890, chap. 132, the bank is not the real party in interest. First Nat. Bank v. Steenson, 629.

PAYMENT.
For corporate stock, see Corporations.

PENALTY.
Of bond, right to interest in excess of, see Damages, 1.

PERFORMANCE.
Specific performance, see Specific Performance.

PHYSICIANS.
Admissibility of evidence of, see Evidence, 21–24.

PLEADING.

Consideration on appeal of order denying motion for leave to file supplemental complaint, see Appeal and Error, 16.

Allowance of amendment as prejudicial error, see Appeal and Error, 22.

In action to cancel instrument, see Cancelation of Instruments.

In action for damages from breach of contract to exchange property, see Exchange of Property; Fraud and Deceit.

In action for fraud, see Fraud and Deceit.

By one collaterally attacking judgment, see Judgment, 16.

Raising bar of limitations by demurrer, see Limitation of Actions.

Necessity of negativing ratification by principal, see Principal and Agent, 2.

CONSTRUCTION.

1. Under N. D. Rev. Codes 1905, § 6869, complaints are to be liberally construed, and the old rule that pleadings are to be interpreted strictly against the pleader no longer obtains. First Nat. Bank v. Messner, 263.
2. The rule that a complaint will be given a liberal construction when attacked by demurrer has never been extended so far as to supply any material allegation omitted. Northern Trust Co. v. First Nat. Bank, 74.

MATTERS OF FACT OR CONCLUSIONS.

3. An allegation in a complaint in a suit for damages and cancelation of a deed on the ground of false and fraudulent representations which induced plaintiffs to enter into a contract for the exchange of property, that the defendants wrongfully obtained possession of a deed, taken together with an allegation that the deed was to be deposited in escrow until the defendants likewise deposited their deed, is not a conclusion of law. Sneve v. Schwartz, 287.

POWER OF SALE.

Foreclosure of mortgage under, see Mortgages, 5–16.

PREJUDICE.

Change of venue on ground of, see Justice of the Peace, 2–4.

PREJUDICIAL ERROR. See Appeal and Error, 21–26.

On criminal prosecution, see Criminal Law, 21–23.

PRESUMPTIONS.
On appeal, see Appeal and Error, 17.
Of unreasonable negligence in delay in bringing action to trial, see Dismissal, 1.
In general, see Evidence, 2–5.
On collateral attack on judgment, see Judgment, 12–15.
As to time shortage in municipal officer's account arose, see Municipal Corporations, 1.

PRINCIPAL AND AGENT.
Conclusiveness, on agent's sureties, of agent's admission of indebtedness to principal, see Evidence, 9.
Conclusiveness on principal of agent's admissions, see Evidence, 9, 10.

1. Where an agent to collect, in violation of his duty releases notes and securities for less than their face value, he can be held liable in an action for damages brought by his principal, even though such principal has not first sought to collect the sum so remitted from the original debtor, or to set aside the release and reassert his lien in a court of equity upon the securities, since the principal is not required to undo or seek to undo that which his agent has voluntarily done. First Nat. Bank v. Messner, 263.

RATIFICATION.

2. The complaint in a suit by a principal against an agent for damages for an unauthorized act need not negative ratification by the principal, since such ratification, if existent, would be a matter of defense. First Nat. Bank v. Messner, 263.

PRINCIPAL AND SURETY.
Conclusiveness on surety of admissions by principal, see Evidence, 11–14.
Right to interest against surety, see Interest.
Liability of surety on official bond, see Municipal Corporations, 1–5; Officers, 2, 3.
Subrogation of surety, see Subrogation.

PRINTING.
Costs for printing on appeal, see Costs, 4, 5.
Contract for public printing, see States, 1, 2.

PROCEEDINGS IN REM.
Proceedings for sale of decedent's real estate as, see Executors and Administrators, 1.

PROCESS.
Writ of prohibition as, see Prohibition.

PROHIBITION.
1. Proceedings to obtain a writ of prohibition may be initiated either by notice to show cause why a writ should not issue or by securing, in the first instance, an alternative writ. Northern P. R. Co. v. Jurgenson, 14.
2. In proceedings initiated through an order to show cause in the district court why a writ of prohibition should not issue against a justice's court alleged to be without, or in excess of, his jurisdiction, the opposing party in the action in the justice's court is a proper, but not a necessary, party; and where in such a case he is not served, the district court may, in the exercise of its sound discretion, continue the hearing and require his service, but if the record shows dismissal of the application for the writ of prohibition, not in the exercise of that discretion, but from the mistaken belief of the court that he was a necessary party, such action of the court will not be sustained. Northern P. R. Co. v. Jurgenson, 14.
3. When it is sought to stay further proceedings of an inferior court in an action pending or on a judgment rendered therein, and notice is served by means of an order to show cause, such notice need not run in the name of the state, as it is not a writ, and is not process within the meaning of § 97 of the Constitution. Northern P. R. Co. v. Jurgenson, 14.

PROPERTY.
Note as, see Corporations, 2.

PROXIMATE CAUSE.
Of injury to employee, see Master and Servant, 1.

PUBLICATION.
Of notice of sale under power in mortgage, see Mortgages, 10, 11.
Of notice of special city election, see Municipal Corporations, 8, 9.

PUBLIC DOCUMENTS.
Mode of proving, see Evidence, 15–17.

PUBLIC MONEY.
Appropriation of, see States, 3–7.

PUBLIC PRINTING.
Construction of contract for, see Contracts, 2.
Contract for, see States, 1, 2.

PUNITIVE DAMAGES. See Damages, 3–5.

QUESTIONS FOR JURY.
In action against carrier for shortage in freight delivered by it, see Carriers, 4, 5.
As to master's liability to injured servant, see Master and Servant, 4, 5.
As to negligence at railroad crossing, see Railroads, 2.

QUIETING TITLE.

1. The nominal plaintiff in an action, in his name, by his grantee, to quiet title against a defendant in possession, is not entitled to any personal relief. Randall v. Johnstone, 284.
2. The use plaintiff in an action in the name of his grantor to quiet title is not entitled to damages for the occupation of the land by the defendant prior to the time the use plaintiff acquired the ownership thereof. Randall v. Johnstone, 284.
3. Since a nominal plaintiff recovers only upon the rights of his use plaintiff, in a suit by a nominal plaintiff for the use of another to recover for the use and occupation of the lands of the latter by the defendant, no recovery can be had for the use and occupation of such lands by such defendant during the time of the previous ownership thereof by the nominal plaintiff, in the absence of the assignment by the nominal plaintiff to the use plaintiff of the former's right of action. Christ v. Johnstone, 6.

RAILROAD CROSSING.
Accidents at, see Railroads.

RAILROADS.

ACCIDENTS AT CROSSINGS.

1. It is the duty of a railway company to keep a proper lookout at a highway crossing within the incorporated limits of a city. Rober v. Northern P. R. Co. 394.

RAILROADS—continued.

2. Where, in an action against a railroad company for death by wrongful act, deceased having been run over by a switch engine at a public crossing, it was shown that the night was cold, windy, and stormy, and that a man could be seen but a short distance away; that a hackman had nearly been run over by an engine operated without signal and lights an hour before the accident; that the crossing was not of legal width; and the position of the remains indicated that the foot of the deceased had been caught in the frog near the end of the board crossing and within the limits of the highway; and that there were no eyewitnesses to the accident,—there was evidence to go to the jury as to whether there was negligence on the part of the railroad company which was the proximate cause of the injury. Rober v. Northern P. R. Co. 394.

— Contributory Negligence at Crossings.

Presumption against suicide of person killed at crossing, see Evidence, 4.

3. The burden of proof to establish contributory negligence, in an action for wrongful death due to being run over by a switch engine at a public crossing on a dark, windy, and stormy night, is upon the railroad company. Rober v. Northern P. R. Co. 394.

4. Evidence in an action for wrongful death against a railroad company, caused by running over deceased with a switch engine at a public crossing within the incorporated limits of a city, on a dark, windy, and stormy night, that a switch engine operated without signal and without lights nearly ran over a hackman at the same spot an hour before the accident, is admissible as bearing upon the negligence of the railroad company and contributory negligence of the deceased and upon what was the real cause of the accident, where the engineer of the engine that killed deceased stated that he had operated his engine with lights, and that he had signaled properly each time he passed the crossing. Rober v. Northern P. R. Co. 394.

5. The presumption of ordinary care which is based upon the instinct of self-preservation is not overcome as a matter of law, and the question of contributory negligence is one for the jury in a suit for wrongful death against a railroad company, deceased having been run over by a switch engine at a public crossing in a city, where it is shown that there were no eyewitnesses to the death; that the night was very cold, windy, and stormy; that a man could be seen but a short distance away; that the crossing was not of legal width, and that, judging from the position of the remains, deceased must have caught his foot in a frog at the end of the crossing; that a hackman had been nearly run over at the same crossing by an engine operated without signal and lights an hour before the accident; al-

RAILROADS—continued.
though the engineer of the engine causing the death claimed that his engine had proper lights and that he signaled each time he passed the crossing. Rober v. Northern P. R. Co. 394.

RAPE.
Evidence admissible in prosecution for statutory rape, see Criminal Law, 6.
Cross-examination of witness on prosecution for, see Witnesses, 2–5.

RATE.
Of interest, see Interest, 2.

RATIFICATION.
Of agent's unauthorized act, see Principal and Agent, 2.

REAL PROPERTY.
Of decedent, sale of, see Executors and Administrators; Judgment, 17.
Mortgage on, see Mortgages.
Quieting title to, see Quieting Title.

RECEIPTS.
By city treasurer to county treasurer, effect, see Municipal Corporations, 2.
Right of holder of warehouse receipt to bring action on bond of warehouseman, see Warehousemen.

RECORDS.
On appeal, see Appeal and Error, 11; Criminal Law, 20.
Effect of failure to record assignment of mortgage, see Mortgages, 12.

REDEMPTION.
From sale on foreclosure, see Mortgages, 17.
From mortgage, see Statutes, 2.

REGISTRATION.
Of voters for special city election, see Municipal Corporations, 10, 11.

REPORTS.
Admissibility of copy of, see Evidence, 8.

RESCISSION.
Of contract, see Cancelation of Instruments; Contracts, 2, 3.

RESOLUTION.
Authorizing city election to increase debt limit by, see Municipal Corporations, 6.

REVERSAL.
Grounds for, see Appeal and Error, 21–26; Criminal Law, 21–23.

REVIEW.
On appeal, see Appeal and Error, 15–26.

SALARY.
For fees, *de jure* officer's right to, see Officers, 1.

SALE.
By administrator, see Executors and Administrators.
On foreclosure of mortgage under power of sale, see Mortgages, 5–16.

SATISFACTION OF JUDGMENT. See Judgment, 19.

SAVING QUESTIONS FOR REVIEW. See Appeal and Error, 4, 5.

SECONDARY EVIDENCE. See Evidence, 7, 8.

SECURITY FOR COSTS.
Pendency of motion to require, as extending time for answering or demurring, see Judgment, 3.

SETTING ASIDE.
Of judgment by default, see Judgment, 5–10.
Of sale under power in mortgage, see Mortgages, 12–16.

SHORTAGE.
In freight delivered by carrier, see Carriers, 2–5.
In accounts of municipal officer, see Municipal Corporations, 1–5.

SIGNALS.
By person in horse-drawn vehicle to driver of automobile, see Highways, 3, 4.

SPECIFIC PERFORMANCE.
One having a contract for the exchange of property, who refuses to perform on his part on a tender by the other party of all that is required of him, cannot, after the period fixed for the performance of the contract, and after the land has greatly increased in value, demand a specific performance from the other party. Golden Valley Land & Cattle Co. v. Johnstone, 148.

STATEMENT OF THE CASE.
On appeal, see Appeal and Error, 11.

STATES.
Necessity that notice to show cause in proceedings to obtain prohibition run in name of, see Prohibition, 3.
State board of tax commissioners generally, see Taxation, 3–5.

CONTRACTS.

Right of taxpayer to bring action to enjoin carrying out of contract for public printing, see Injunction, 1.

1. A lease by a company holding a contract for state printing, of the entire plant of another company which does not possess the necessary statutory qualifications to do state printing, is not shown to be a mere device to evade the statute, by evidence that the lessee had the work on a prior state contract done by a foreign company whose officers subsequently organized the lessor, that a large payment by the state was turned over *in toto* to the lessor, to which more than that amount was then due under

STATES—continued.

the contract, and that the lessor was formed soon after the lessee received the state contract. State ex rel. Miller v. Hall, 85.

2. A contract between two printing companies to enable the second party to perform its contract for state printing, in which the first party agrees to lease to the second for two years all its printing and binding machinery, the first party having the privilege of using said machinery when not in use by the second party, and to furnish the necessary labor and materials at cost price plus a certain percentage, the second party to pay each month, in addition to such amount, a certain sum, is a contract for the hiring of machinery, furnishing of labor, and sale of material, which can be entered into lawfully by the parties, though the first party does not possess the necessary statutory qualifications to do state printing. State ex rel. Miller v. Hall, 85.

APPROPRIATIONS.

3. N. D. Laws 1911, chap. 303, § 6, which provides that "the commissioners first appointed under this act, after having duly qualified, shall without delay meet at the capitol at Bismarck, and shall thereupon organize by electing a secretary, who shall receive a salary of not more than $2,400 per annum," creates a valid annual appropriation of $2,400. State ex rel. Birdzell v. Jorgenson, 539.

4. A provision in a statute providing for three tax commissioners, that "each of said commissioners shall receive an annual salary of $3,000, payable in the same manner that salaries of other state officers are paid," is a valid annual appropriation of $9,000,—especially where there is another statutory provision appropriating annually out of any funds in the state treasury not otherwise appropriated such sums as may be necessary to pay the salaries of the various state officers. State ex rel. Birdzell v. Jorgenson, 539.

5. The provision of § 14 of chap. 303 of N. D. Laws 1911, creating a tax commission, that "there is hereby annually appropriated out of any funds in the state treasury not otherwise appropriated the sum of $3,000, or as much thereof as may be needed for the purpose of carrying out the provisions of this act," is not all inclusive of the money appropriated for such commission, but constitutes a valid appropriation of $3,000 to cover incidental expenses of the commission not expressly provided for in other sections of the act. State ex rel. Birdzell v. Jorgenson, 539.

6. Section 8 of chapter 303 of the Laws of 1911, which provides that the commission thereby created shall keep its office at the capitol, and "shall be provided with suitable rooms, necessary office furniture, supplies, stationery, books, periodicals, and maps; and all necessary expenses shall be audited and paid as other state expenses are audited and paid. The com-

STATES—continued.

missioners, secretary and clerks and such experts and assistants as may be employed by the commission shall be entitled to receive from the state their actual necessary expenses while traveling on business of the commission; such expenditure to be sworn to by the party who incurred the expense, and approved by the chairman of the commission, or a majority of the members of such commission, but the total amount to be expended for such office supplies and traveling expenses shall not exceed the sum of $4,500,"—constitutes a valid annual appropriation to the amount of $4,500. State ex rel. Birdzell v. Jorgenson, 539.

7. N. D. Laws 1911, chap. 303, § 7, which provides that the commission thereby created may, in addition to the secretary provided for in § 6 of the act, "also employ such other persons as clerks, stenographers, and experts as may be necessary for the performance of the duties required of the commission," and which further provides that "the commission shall fix the compensation of such secretary, clerks, stenographers, and experts employed by them, but the total amount expended for that purpose shall not exceed $6,000 per annum," constitutes a valid annual appropriation of $6,000. State ex rel. Birdzell v. Jorgenson, 539.

STATUTES.

TITLES OF ACTS.

1. That portion of chapter 193 of the Session Laws of 1907, which makes it a misdemeanor knowingly to permit, otherwise than by leasing, any building to be used for the purpose of unlawfully dealing in intoxicating liquors, is not violative of § 61 of the state Constitution as being broader than the title of the act, which title in its terms concerns the letting only of any building for such purpose. State v. McGillic, 27.

CONSTRUCTION.

2. A redemption statute will be liberally construed in order to effectuate the intention of the legislature. Leverson v. Olson, 624.

STATUTORY RAPE.

Evidence admissible in prosecution for, see Criminal Law, 6.

Cross-examination of witness on prosecution for, see Witnesses, 2–5.

STAY.
Liability on bonds given to stay proceedings pending appeal, see Appeal and Error, 28–32.
Prohibition to obtain stay of proceedings, see Prohibition.

STENOGRAPHER.
Taxing fees of, as costs, see Costs, 1.

STOCK.
Of corporation, see Corporations.

STORAGE TICKETS.
Right of holder on bond of warehouseman, see Warehousemen.

STRIKING OUT.
Of evidence, see Trial, 1.

SUBROGATION.
The surety company upon the bond of a defaulting county treasurer, which has made good the defalcation by paying a judgment by the county recovered therefor against it upon the bond, is subrogated to the rights of the county in the matter of recovering the funds from a bank which unlawfully received them from the treasurer, under N. D. Rev. Code 1905, § 6110, providing that a surety, upon satisfying the obligation of the principal, is entitled to enforce every remedy which the creditor then has against the principal to the extent of reimbursing what he has expended; and the bank cannot by virtue of the provision of N. D. Rev. Codes 1905, § 6107, that a surety "may" require his creditors to pursue remedies, contend in defense that the surety company should have compelled the county to proceed against the bank before making good the defalcation. Northern Trust Co. v. First Nat. Bank, 74.

SUICIDE.
Presumption against, see Evidence, 4.

SUPERSEDEAS.
Liability on supersedeas bonds, see Appeal and Error, 28–32.
Estoppel to recover on supersedeas bond, see Estoppel.

SUPERVISORY JURISDICTION.
Of supreme court, see Courts.

SUPPLEMENTAL PLEADING.
Consideration on appeal of refusal to permit service of, see Appeal and Error, 16.

SUPREME COURT.
Original jurisdiction of, see Courts.

SURETY COMPANY.
Amount paid to, for executing appeal bond, as taxable costs, see Costs, 7.
Subrogation of, see Subrogation.

TAXATION.

Tax on Corporate Stock.

Double taxation, see infra, 2.
Injunction against, see Injunction, 2.
Right of corporation to bring action to restrain collection of tax, see Parties, 2.

1. Under N. D. Laws 1890, chap. 132, §§ 24–26, 39, 44, a national banking association is neither authorized nor required to pay a personal tax on its shares of capital stock, which have been assessed against their individual owners. First Nat. Bank v. Steenson, 629.

Double Taxation.

2. The assessment to the individual stockholders of their shares of stock in a national bank, without deducting from its capital the amount invested in real estate assessed to the bank like other real estate in the district, does not constitute excessive nor double taxation. Matter of First Nat. Bank, 635.

State Board of Tax Commissioners.

Appropriation for salaries of, see States, 3–7.

3. The members of the state board of tax commissioners created by N. D. Laws

TAXATION—continued.

1911, chap. 303, who by such act have been vested with a general supervisory power over the various taxing agencies and boards of review of the state, and with the power themselves to assess in certain instances, are state officers. State ex rel. Birdzell v. Jorgenson, 539.

4. The word "until" as found in § 3 of chap. 303 of N. D. Laws 1911, creating a tax commission, which provides that if the appointment of the commissioners be made when the legislature is not in regular session "the appointee shall hold his office until the third Monday in January, in the next biennial session of the legislature, when, if such appointment is not confirmed by the senate, the office shall become vacant,"—includes the said third Monday in January. State ex rel. Birdzell v. Jorgenson, 539.

5. The provision of § 3, chap. 303, N. D. Laws 1911, creating a state tax commission, that if an appointment be made by the governor when the legislature is not in regular session the appointee shall hold his office until the third Monday in January in the next biennial session of the legislature, when, if such appointment is not confirmed by the Senate, the office shall become vacant,—is modified by a previous provision in said section confining it to the appointment of commissioners made after the appointment of the original commissioners; and therefore the confirmation of the appointment of the original commissioners may be made at any time during the legislative session. State ex rel. Birdzell v. Jorgenson, 539.

REVIEW OF ASSESSMENT.

6. Under N. D. Rev. Codes 1895, § 1927, an appeal will lie from a decision of the board of county commissioners, made while equalizing and correcting assessments in a controversy then pending before them and judicial in its character. Matter of First Nat. Bank, 635.

TAX COMMISSIONERS.

Appropriation for salaries of, see States, 3–7.

In general, see Taxation, 3–5.

TECHNICAL ERROR. See Appeal and Error, 23, 27.

TERMS.

Abuse of discretion in imposing, on setting aside judgment, see Appeal and Error, 18.

Imposition of, on vacating judgment by default, see Judgment, 7–9.

THREATS.
Validity of mortgage obtained by means of, see Mortgages, 2.

THRESHING ENGINE.
Employer's liability for injury by fire from, started by independent contractor, see Master and Servant, 8.

TIME.
To demur to information, see Criminal Law, 1–3.
To file exceptions, see Criminal Law, 19.
For claiming exemptions by married woman, see Exemptions.

TITLE.
Of statute, see Statutes, 1.

TRANSCRIPT.
Costs for making, see Costs, 4.

TREASURER.
Liability on bond of, see Municipal Corporations, 2–5; Officers, 2, 3.
Subrogation of surety on bond of, see Subrogation.

TRIAL.
In action against carrier for shortage in freight delivered by it, see Carriers, 4, 5.
Time to prepare for, see Criminal Law, 1–3.
Question for jury as to master's liability for injury to servant, see Master and Servant, 4, 5.
Question for jury as to negligence at railroad crossing, see Railroads, 2.

1. Testimony in an action to recover damages for the alleged negligent setting of a prairie fire to the destruction of plaintiff's grain, that a stranger to the suit caused it to be insured in his name and after the fire collected the insurance, is properly stricken out where it is not shown that plaintiff had any connection with, or knowledge of, the insurance, and there is positive proof of plaintiff's ownership of the grain. Huffman v. Bosworth, 22.

TRIAL—continued.

INSTRUCTIONS.

On criminal prosecution, see Criminal Law, 10–13.
Prejudicial error in giving, see Criminal Law, 22, 23.

2. An instruction which assumes that an automobile is a novel means of transportation is improper. Messer v. Bruening, 599.
3. An instruction which permits the jury to speculate upon what might be negligence, and base a verdict upon something they might infer to be negligence, other than the specific negligent act charged in the complaint, is error. Messer v. Bruening, 599.

TRIAL DE NOVO.

Presumptions on, see Appeal and Error, 17.

UNDERTAKING.

On appeal, see Appeal and Error, 8–10, 28–32.

USE AND OCCUPATION.

Allowance for, in action to quiet title, see Quieting Title, 2, 3.
Liability for, of purchaser taking possession and not performing contract, see Vendor and Purchaser, 1.

USE PLAINTIFF.

As real party in interest, see Parties, 1.
Rights of, in action to quiet title, see Quieting Title, 2.

VACATION.

Of judgment by default, see Judgment, 5–10.

VENDOR AND PURCHASER.

1. One having a contract for the purchase of land, who enters thereon without performing his part of the contract, notwithstanding the constant readiness of the other party to perform, is liable for the use and occupation of such premises while he is in possession thereof. Golden Valley Land & Cattle Co. v. Johnstone, 148.
2. One who enters into an agreement for the exchange of property, to be made on or before a specified date, agreeing to deed his property to the other on receiving from him a contract for the land to be conveyed by such other

VENDOR AND PURCHASER—continued.

party, cannot refuse to accept such contract when tendered within the time agreed on, and refuse to deed his own property, on the ground that the record title to the property is not in such other party at the time the contract is tendered, where such other party has an executory contract for the purchase of a tract of land including that covered by the contract, which entitles him to secure deed to any part thereof at any time on paying therefor, and states at the time of making the tender that he will acquire title and convey the premises as soon as the other party has fully performed on his part. Golden Valley Land & Cattle Co. v. Johnstone, 148.

VENUE.

Certiorari to review refusal to change, see Certiorari.

Change of venue of action before justice of the peace, see Justice of the Peace, 2–4.

VERDICT.

Appealability of order denying motion for judgment notwithstanding, see Appeal and Error, 1, 2.

Judgment notwithstanding, see Judgment, 11.

VERIFICATION.

Of accusation in disbarment proceedings, see Attorney and Client, 1, 2.

VOTERS. See Elections.

WAIVER.

Of failure to file exceptions within statutory period, see Criminal Law, 19.

WAREHOUSEMEN.

1. A holder of a wheat storage ticket cannot bring an individual action upon the bond required by N. D. Rev. Codes 1905, § 2247, to be given to the state by a warehouseman to protect ticket holders, but he must bring the action on behalf of all the holders of tickets upon which default has been made, the better practice, however, being to bring the action in the name of the state for the benefit of such ticket holders, under the authority of

WAREHOUSEMEN—continued.

§ 6809, providing that a trustee may sue without joining the beneficiaries. Phillips v. Semingson, 460.

2. The facts that the license of a warehouseman authorized him to continue business for a period beyond that designated in his bond, given as required by N. D. Rev. Codes 1905, § 2247, to protect ticket holders, that his elevator was moved a short distance within the same village, and that no judgment was ever recovered against him, do not constitute a bar to an action upon his bond by holders of wheat storage tickets upon which default has been made. Phillips v. Semingson, 460.

WAREHOUSE RECEIPTS.

Right of holder on bond of warehouseman, see Warehousemen.

WEIGHT.

Of freight delivered to and by carrier, see Carriers, 2–5.

WITNESSES.

Competency of expert witness, see Criminal Law, 4, 5.

Correctness of instruction as to credibility of, see Criminal Law, 10–12.

CROSS-EXAMINATION.

1. Witnesses for the state in a criminal prosecution may be cross-examined for the purpose of showing hostility toward defendant, or their state of mind regarding him. State v. Kahellek, 109.
2. It is improper, in a trial for statutory rape, to cross-examine the defendant as to matters involving the death of his first wife, ten years before, from which the jury might have been able to conclude that her death was due in part to his refusal to call a doctor for her during or shortly after she had given birth to a child, and as to his calling her and her relatives sports. State v. Apley, 298.
3. Testimony elicited by cross-examination of a prosecutrix in a trial for statutory rape, tending to show that about one year before the commission of the alleged offense she had been an inmate of a house of prostitution for three weeks, is admissible as proof of unchastity and immoral character, as affecting her credibility, it being immaterial that she was under the age of consent. State v. Apley, 298.
4. Where a physician as a witness for the state, in a trial for statutory rape, testified as to the physical condition of the prosecutrix ten days to two weeks after the commission of the alleged offense, the effect of such testi-

WITNESSES—continued.

mony being to corroborate prosecutrix's testimony that the crime was committed by defendant, the defense should have been allowed to cross-examine prosecutrix as to specific acts of intercourse with others, so as to show that her condition might have been caused by others. State v. Apley, 298.

5. Where, in a trial for statutory rape, a witness for the state testified on direct examination that she had procured a warrant from a justice of the peace for the arrest of prosecutrix on an alleged charge of grand larceny, by prearrangement with prosecutrix two days before the arrest of defendant, in order that the prosecutrix might press the charge against defendant with safety, the defense should have been allowed to fully cross-examine the witness as to whether at the time she swore to the complaint for larceny she said anything to the justice of the peace with reference to the talk she had with the prosecutrix regarding the proposed arrest for larceny, where the effect of the cross-examination might be to discredit the witness and cast doubt upon the good faith and motives of the prosecutrix in the prosecution. State v. Apley, 298.

6. Questions propounded to a witness on cross-examination in a criminal trial for abortion, as to whether another physician, who was called in by defendant to assist him, gave deceased any treatment at the time, or whether the defendant ever visited the witness or attempted to communicate with her, and which were not proper at the time in the order of proof, were properly refused where the witness had already testified sufficiently on the point, as the scope of cross-examination is within the sound discretion of the court. State v. Reilly, 339.

WORDS AND PHRASES.

Property, see Corporations.

WRIT.

Of prohibition, see Prohibition.